Supreme Court, U.S.
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No. 03 175

In The
Supreme Court of the United States

AROLDO COLIN,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under Rule 56 of the Federal Rules of Civil Procedure, may summary judgment be granted, or affirmed upon a mandated *de novo* review, based on the court's improper determination of fact issues, without any consideration of relevant and undisputed evidence and inferences therefrom in the non-moving party's favor, and without the express determination of whether genuine issues of material fact exist?

PARTIES TO THE PROCEEDING

Including the parties named in the caption of this Petition, the parties are:

Petitioner: Aroldo Colin, an individual

Respondent: The United States of America

CORPORATE DISCLOSURE STATEMENT

No parties are corporations. Sup. Ct. R. 29.6

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS AND RULES INVOLVED	1
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	9
I. Proper application of summary judgment standards is vital to the effectiveness, credibility and efficiency of the federal courts...	9
A. The court of appeals exceeded the scope of its limited role on summary judgment when it decided that the evidence "showed" negligence but not willful misconduct	11
B. The court of appeals improperly applied summary judgment standards and usurped the role of fact finder in deciding, as a matter of fact, that the government had not received consideration from others for recreational purposes	15

TABLE OF CONTENTS – Continued

Page

C. The court of appeals improperly applied summary judgment standards and usurped the role of fact finder in deciding the fact question whether Colin's injury took place on a "lake" or on a "river or stream." 18

CONCLUSION 22

TABLE OF AUTHORITIES

Page

CASES:

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)..... 3

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 3, 9

Donaldson v. U.S., 653 F.2d 414 (9th Cir. 1981) 18, 20

MacLeod v. U.S., 1994 WL 860798 (C.D. Cal. 1994).....12

Martin v. Wilks, 490 U.S. 755 (1989)..... 9

Miller v. U.S., 945 F.2d 1464 (9th Cir. 1991).....12

Morgan v. Southern Pacific Trans. Co., 37 Cal.App.3d 1006, 112 Cal.Rptr. 695 (1974) 11

Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1962).....9, 10

Reuther v. Viall, 62 Cal.2d 470, 398 P.2d 792, 42 Cal.Rptr. 456 (1965).....11

Rooney v. United States, 634 F.2d 1238 (9th Cir. 1980).....12

Rost v. U.S., 803 F.2d 448 (9th Cir. 1986).....12

Termini v. U.S., 963 F.2d 1264 (9th Cir. 1992).....12

STATUTORY PROVISIONS AND RULES:

28 U.S.C. § 1346(b) 5

California Civil Code § 846.....*passim*

California Health & Safety Code §§ 116000.....2, 5, 7, 8, 18

Fed. R. Civ. Pro. 56 ..... 1, 3, 10, 11

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES:

American Heritage Dictionary of the English Language (4th Ed. 2000).....19

18 C. Wright, A. Miller, et al., Federal Practice and Procedure § 4449 (1981)..... 9

Miller, Arthur R., *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. Rev. 982, 1072 (2003).....9, 10

Mollica, Paul W., *Federal Summary Judgment at High Tide*, 84 Marq. L. Rev. 141 (2000).....21

Wald, Patricia, *Summary Judgment at Sixty: 1998 Federal Practice and Procedure Symposium*, 76 Tex. L. Rev. 1897 (1998).....20

PETITION FOR A WRIT OF CERTIORARI

AROLDO COLIN, petitioner, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of California is reported at 2001 WL 76998 (May 17, 2001). The Memorandum Opinion of the Court of Appeals for the Ninth Circuit is published as an unreported opinion at 56 Fed.Appx. 831 (March 3, 2003). The decision of the Court of Appeals for the Ninth Circuit denying Petitioner's Petition for Rehearing and Petition for Rehearing En Banc is unreported.

JURISDICTION

The court of appeals' judgment was entered on March 3, 2003. A timely petition for rehearing was denied on May 7, 2003. (App. 55). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

Federal Rule of Civil Procedure 56, in pertinent part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with

> the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

California Civil Code § 846, in pertinent part:

> An owner of any estate or any other interest in real property, whether possessory or nonpossessory, owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose or to give any warning of hazardous conditions, uses of, structures, or activities on such premises to persons entering for such purpose, except as provided in this section. . . .
>
> This section does not limit the liability which otherwise exists (a) for willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity; or (b) for injury suffered in any case where permission to enter for the above purpose was granted for a consideration other than the consideration, if any, paid to said landowner by the state, or where consideration has been received from others for the same purpose; or (c) to any persons who are expressly invited rather than merely permitted to come upon the premises by the landowner. Nothing in this section creates a duty of care or ground of liability for injury to person or property.

California Health & Safety Code § 116000:

"Resort," as used in this article, means any public bathing or swimming place or resort on a river or stream.

STATEMENT OF THE CASE

This case calls on the Court's supervisory powers to correct an extreme departure from the proper application of the summary judgment procedures and standards established by Federal Rule of Civil Procedure 56(c) and enunciated in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The court of appeals' affirmance of the district court's grant of summary judgment reflected an impermissible deviation from the requirement that the court not decide disputed questions of fact, and that the court deny summary judgment where genuine issues of material fact exist.

Aroldo Colin's claim arose on Sunday, June 15, 1997, Father's Day, when twenty-year-old petitioner Colin went with friends and relatives to the designated swimming area, known as "Yorty Creek," at the Lake Sonoma Recreation Area in Cloverdale, California. The Lake Sonoma reservoir was created by the United States Government, through the U.S. Army Corps of Engineers, when it built the Warm Springs Dam in 1983. The reservoir was created as a temporary holding area for water flowing from Yorty Creek and other subsidiary creeks into the Russian River and on to the Pacific Ocean. Yorty Creek is the only swimming area designated by the government on the entire man-made reservoir. The former park manager confirmed that the site of Aroldo Colin's injury on Yorty Creek was within the recreation area.

At the Yorty Creek swim area, Aroldo Colin and his younger cousins including Manuel swam across a narrow inlet, intending to climb and jump into the water out of a

tree whose limbs extended over the water. It was undisputed that Colin's companions had told him that people frequently jumped from trees at Yorty Creek into the water. They had seen "lots of people" jumping from trees and using rope swings at Yorty Creek, and they had never been warned or made aware that those activities were prohibited at the swimming area or elsewhere on the reservoir. Colin himself had seen people using a rope swing from a tree at Yorty Creek, and he did not believe that jumping from trees into the water was dangerous. Despite many prior visits to Yorty Creek, neither Colin nor any of his companions had ever heard a government park ranger warn against jumping or diving from the trees.

Immediately prior to his injury, both Colin and his younger cousin Manuel made jumps from the tree into the water without encountering any difficulties or being alerted to any potential hazards. Intending to make a second jump, Colin climbed to a different limb. Colin inched out onto the limb, balancing himself by holding onto a smaller limb above him. Due to its dead and decayed condition which was unknown to the boys, the limb on which Colin was standing suddenly broke and collapsed beneath him, causing Colin to fall involuntarily head-first into the shallow water beneath the tree. Because the branch collapsed before Colin was able to move as far out on the branch over deep water as he had intended, when he fell he struck the creek bottom or a protrusion off the bottom. He suffered a severe spinal cord injury and is now and forever will be quadriplegic.

Aroldo Colin filed suit in the U.S. District Court for the Northern District of California asserting claims for negligence and willful misconduct against the United

States through its agent, the U.S. Army Corps of Engineers. Colin asserted that the government is liable under the Federal Tort Claims Act, 28 U.S.C. § 1346(b) for (1) failing to remove or properly maintain dead trees and/or dead limbs adjacent to the water at the swimming area despite knowing that the trees were used by park visitors for jumping and diving and that they were hazardous; (2) failing to sound the depths of water, post signs regarding water depth, and determine and mark obstructions and other hidden dangers as required by the California Resort Act, Health & Safety Code §§ 116000 *et seq.*; and (3) failing to warn of such hazards.

The government moved for summary judgment claiming immunity under California Civil Code § 846, a statute which provides conditional immunity to landowners when others enter onto their property for a recreational purpose.

In opposition, Colin asserted that his case fell within two express exceptions to recreational immunity, under which immunity is denied, namely, "(a) for willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity" or "(b) for injury suffered in any case where permission to enter for the above purpose was granted for a consideration other than the consideration, if any, paid to said landowner by the state, or where consideration has been received from others for the same purpose." Ca. Civ. Code § 846.

The U.S. District Court for the Northern District of California granted summary judgment to the government. The court held that Colin had failed to raise genuine issues of material fact about application of either exception.

Regarding the first exception for "willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity," the district court applied a three pronged test[1] and concluded that Colin had failed to raise genuine issues of material fact on two of the three elements. However, in considering those elements, the district court deviated significantly from the required application of well-accepted summary judgment standards by disregarding disputed issues of material fact, rejecting evidence and disregarding inferences in Colin's favor from the evidence, and itself making findings on disputed issues of fact. By departing from the accepted summary judgment standards, the district court erroneously concluded that there were no genuine issues of material fact as to whether the willful misconduct exception applied.

The district court also found no genuine issue of material fact regarding the application of the "consideration" exception to § 846. Although the language of California Civil Code § 846 denies immunity "where consideration has been received from others for the same purpose," namely recreation, the district court disregarded or rejected specific evidence that the government had in fact received consideration at the recreation area for recreational purposes within the terms of the exception.

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[1] The district court held that Colin was required to establish three elements: (1) the government's actual or constructive knowledge of the peril to be apprehended; (2) the government's actual or constructive knowledge that injury is a probable, as opposed to a possible, result of the danger; and (3) the government's conscious failure to avoid the peril.

The failure of the district court to apply summary judgment standards properly also affected its decision on the application of the California Resort Act, Health & Safety Code §§ 116000 *et seq.* Under that statute, the government is subject to particular standards and duties and may be liable for negligence if it is found, as a question of fact, to operate "any public bathing or swimming place or resort on a river or stream." Considering that fact question in the context of the government's motion for summary judgment, the district court's role was limited to determining whether or not there were material facts in dispute on that issue. Instead, the district court disregarded or rejected affirmative evidence offered by Colin, and improperly made its own factual determination that Colin's injury had occurred on a lake and not on a river or a stream, notwithstanding evidence establishing that the reservoir where the injury occurred is man-made; that it is filled from streams; that water flows into the reservoir from creeks and out into the same river those creeks fed before the dam was built; and that Colin's injury occurred on Yorty Creek.

Colin filed a timely appeal in the Ninth Circuit Court of Appeals. The court of appeals, affirming the district court's grant of summary judgment, failed to correct the district court's improper application of the summary judgment standard. Although a *de novo* review of the district court's decision on summary judgment should have required the court of appeals to address the specific material facts which Colin asserted were in dispute, the court of appeals' decision reflects no such analysis.

On the question of willful misconduct, the court of appeals did not address the evidence in Colin's favor. Indeed, it did not address the evidence at all. The court of

appeals did not determine whether there were genuine facts in dispute. Instead, it simply stated that "the evidence showed negligence . . ." and not willful misconduct. (App. 2).

Regarding the consideration exception to the recreational immunity statute, the court of appeals again strayed from its role of limited inquiry and did not address the question of whether there were genuine facts in dispute. Instead, without taking contrary facts and inferences into account, the court of appeals announced its factual conclusion that "[t]he use fees collected at this recreation area were for boat launches and overnight use of the campgrounds. No fees were charged for swimming, picnicking, or any of the uses in which the plaintiff was engaged." (App. 2). The court of appeals ignored the government's collection of consideration, (i.e., money), for recreational purposes which nullifies recreational immunity, and disregarded the fact that under the terms of the statute, the application of recreational immunity presupposes *no* receipt of consideration from others for recreational purposes.

Regarding application of the California Resort Act, California Health & Safety Code § 116000 *et seq.*, the court of appeals impermissibly resolved a disputed question of fact by baldly concluding that the Resort Act did not apply "because the accident occurred on an artificially created lake, not a river or stream."

When the court of appeals affirmed the order granting summary judgment, Colin filed a timely petition for rehearing and a petition for rehearing en banc. Those petitions were denied on May 7, 2003.

REASONS FOR GRANTING THE PETITION

I. Proper application of summary judgment standards is vital to the effectiveness, credibility and efficiency of the federal courts.

The decision of the court of appeals erodes the validity and efficacy of summary judgment in the federal courts by failing to uphold the strict standards for its use enunciated by this Court. Summary judgment is "an integral part of the federal rules as a whole, which are designed to secure the just, speedy, and inexpensive determination of every action." *Celotex Corp. v. Catrett,* 477 U.S. 317, 327 (1986). While summary judgment is an important procedural tool, *id.,* its purpose is not to deprive litigants of their right to trial if they have issues to try. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962).

This Court has acknowledged "our 'deep-rooted historic tradition that everyone should have his own day in court.'" *Martin v. Wilks,* 490 U.S. 755, 762 (1989) (quoting 18 C. Wright, A. Miller, et al., Federal Practice and Procedure § 4449, at 417 (1981)).

> Our civil dispute resolution system has always preferred adjudication based on oral testimony in open court subject to cross-examination. Indeed, although these elements are not guaranteed in all circumstances, they are considered aspects of what often is referred to as a "day in court," with due process embracing notions of a fair trial before an impartial tribunal.

Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. Rev. 982, 1072 (2003).

"Improper, overly-enthusiastic use of summary judgment can result in trial-worthy cases being terminated prior to trial on motion papers," and as a result in the compromise of litigant[illegible] constitutional rights to a day in court and a full trial. [illegible] at 1071. To protect against that impingement on the rights of litigants to have their day in court, Rule 56 of the Federal Rules of Civil Procedure and cases decided by this Court authorize summary judgment only where the moving party is entitled to judgment as a matter of law, where it is clear what the truth is, and where no genuine issue remains for trial. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 467 (1962).

Further, the scope of the district court's role on a motion for summary judgment, and that of a court of appeals in its *de novo* review of a ruling on summary judgment, is limited. The court is not permitted to try or decide issues of fact on a summary judgment motion, but is empowered to determine only whether there are issues to be tried. Strict adherence to these foundational standards ensures that the right of persons asserting claims and defenses adequately based in fact will get their claims and defenses tried to a court or jury, as the law guarantees.

The court of appeals failed to hold the district court to those standards, and failed to apply them in its review of the summary judgment decision. Affirming the district court's ruling in the face of clear and genuine issues of material fact, and basing its decision on its own determinations of disputed fact, the court of appeals' decision severely undermines the purpose and validity of the summary judgment procedure. As a result, the decision below not only deprives an individual litigant of his right to have the material facts in dispute on the substantive

issues of his claim decided pursuant to fair and correct procedure; more importantly, the decision raises serious concern about the ability of litigants in the federal courts to have their genuinely-disputed issues heard and decided in open court, and to have Rule 56 of the Federal Rules of Civil Procedure applied fairly and correctly to them.

A. The court of appeals exceeded the scope of its limited role on summary judgment when it decided that the evidence "showed" negligence but not willful misconduct.

On the willful misconduct exception to California Civil Code § 846, the court of appeals' memorandum opinion stated that "the district court did not err in holding that there had been no showing of willful misconduct as required under California Civil Code § 846. The evidence showed negligence at best." (App. 2). However, in reviewing a decision on summary judgment, the role of the court of appeal is not to determine what the evidence "showed." To the contrary, the court's role is limited to the determination whether there are sufficient facts in dispute from which a reasonable fact finder could conclude what the evidence "showed." The court of appeals misunderstood its province and failed to make that determination.

Under California law, the question whether a party's conduct amounted to willful misconduct, as opposed to negligence, is a question of fact. *See, e.g., Morgan v. Southern Pacific Trans. Co.*, 37 Cal.App.3d 1006, 1014, 112 Cal.Rptr. 695, 700 (1974); *Reuther v. Viall*, 62 Cal.2d 470, 398 P.2d 792, 42 Cal.Rptr. 456 (1965). The Ninth Circuit Court of Appeals has held that the application of a legal standard such as "willful misconduct" to a set of facts is

itself a factual determination. *Rost v. U.S.*, 803 F.2d 448, 450 (9th Cir. 1986); *Rooney v. United States,* 634 F.2d 1238, 1244 (9th Cir. 1980).

In *Rost v. U.S.*, 803 F.2d 448 (9th Cir. 1986), *Termini v. U.S.*, 963 F.2d 1264 (9th Cir. 1992), and *Miller v. U.S.*, 945 F.2d 1464 (9th Cir. 1991), the Ninth Circuit Court of Appeals considered various factors in assessing whether the elements of the willful misconduct test were present. Factors deemed important included the defendant's knowledge of the existence of a dangerous condition; a defendant's failure to obey its safety policies; the failure to post warning signs; the period over which a defendant knew of the hazard yet failed to remedy it; and the ease with which the defendant could have guarded against the sort of injury that occurred. The abandonment of previously taken or recommended preventive measures has also been considered a significant factor. *MacLeod v. U.S.*, 1994 WL 860798 (C.D. Cal. 1994).

In the instant case, the evidence which raised a genuine issue of fact as to the government's willful misconduct included the following:

1. Undisputed evidence of the constant and long-standing presence of the hazard presented by dead trees and limbs along the recreation area shoreline at the designated swimming area (1 ER 00166/69:23-70:19; 00167/72:8-73:11; 00272/24:14-20);

2. Undisputed evidence that the government's posted rules expressly permitted diving "except where posted" (1 ER 00179/147:17-23; 00214/107:15-108:1; 2 ER 00404);

3. The undisputed absence of any sign at Yorty Creek or elsewhere in the recreation area prohibiting climbing, jumping, or diving from trees, despite the rangers' knowledge that such activities were dangerous and that visitors engaged in them (1 ER 00168/79:21-25; 00200/29:7-00201/29:11; 2 ER 00344/48:10-17);

4. Undisputed evidence that signs prohibiting or warning against climbing, jumping, or diving from trees, and/or to warn against the increased dangers of dead trees on the shoreline were easily available to the government (1 ER 00178/138:8-10, 142:2-5; 00179/145:3-9; 2 ER 00429, 00444);

5. The government rangers' recognition that oral warnings were necessary to protect visitors from the danger of climbing trees along the shore (1 ER 00168/78:22-79:20; 00237/66:6-12; 00270/17:5-8);

6. The infrequent presence of rangers at Yorty Creek, and the resulting absence of any type of warnings for most Yorty Creek visitors, most of the time (1 ER 00170/90:2-12; 00254/56:4-8; 2 ER 00341/31:1-23);

7. The government's failure to follow its mandatory safety policy requiring removal of dead trees and limbs near the water and requiring regular inspection of swimming areas for unsafe conditions (1 ER 00166/69:23-70:19; 2 ER 00462, ¶2(d); 1 ER 00161/40:22-41:25; 1 ER 00166/70:12-22; 1 ER 00206/59:9-17, 60:6-23; 00233/39:16-19; 2 ER 00350/101:15-18);

8. The admission by one government ranger that visitors might not perceive jumping or diving from trees as dangerous, the testimony of various witnesses that jumping from trees into the water was not obviously dangerous to them, and the recognition in the government's own safety policy that not all visitors are "cognizant of safety practices", all of which led to a reasonable inference that the risk of climbing a tree to jump or dive into the water was not open or obvious (1 ER 00037/76:8-17; 00057/40:3-8; 00093/36:1-2; 2 ER 00358/87:24-88:1; 00447);

9. The rangers' knowledge that dead trees posed a greater hazard to visitors than live trees did because of the risk that a tree or limb could break and fall (1 ER 00272/24:14-20; 00166/69:23-70:19; 00167/72:8-73:11);

10. The inability of witnesses, including professional park rangers, to determine whether trees along the shoreline were dead or alive, leading to the inference that the increased danger presented by dead trees and limbs was not obvious to members of the public such as Colin (1 ER 00163/49:23; 00250/33:3; 00273/34:16; 2 ER 00356/49:5-17); and

11. The park manager's abandonment of a mandated and previously implemented program of inspections for dead trees and limbs to remove potential hazards to visitors (1 ER 00282/87:12-88:20-25; 00161/41:10-25).

Construed in Colin's favor, this evidence raised genuine issues of material fact regarding each element of the test for willful misconduct. In disregarding or rejecting this

evidence, and in deciding that the evidence "showed" negligence but not willful misconduct, the court of appeals usurped the role of fact finder and failed to apply the summary judgment standards properly.

B. The court of appeals improperly applied summary judgment standards and usurped the role of fact finder in deciding, as a matter of fact, that the government had not received consideration from others for recreational purposes.

Colin asserted that the evidence on the record, taken in the light most favorable to him with all reasonable inferences in his favor, raised a triable issue of fact about whether the government received consideration at the recreation area for recreational purposes, bringing his case within the consideration exception to recreational immunity under Ca. Civ. Code § 846.

Without addressing whether disputed issues of fact existed, the court of appeals reached its own decision that "[t]he use fees collected at this recreation area were for boat launches and overnight use of the campgrounds. No fees were charged for swimming, picnicking, or any of the uses in which the plaintiff was engaged." (App. 2). The court of appeals simply disregarded that the government's admitted collection of consideration for camping and boating constituted receipt of consideration for recreational purposes, within the terms of the exception.

Moreover, the court's conclusion again demonstrates the court of appeal's impermissible intrusion into the role of the ultimate fact finder. To reach its decision, the court of appeals had to either ignore or reject specific evidence

and inferences in Colin's favor. Contradicting the government's position that it charged fees only for boat launching and overnight camping, there was evidence on the record permitting the conclusion that the government received consideration for day-use activities like Colin's (bathing, picnicking and swimming) at Yorty Creek, the locale of his injury. That evidence included:

1. Specific, undisputed testimony that a witness had paid, and therefore that the government had received, a fee for day-use activities at Yorty Creek. (1 ER 00343/45:3-10);

2. The undisputed presence of a "US Fee Area" sign at the Yorty Creek parking lot (1 ER 00210/84:20-85:1; 00276/49:13-50:2; 00236/56:11-16; 2 ER 00396; 00399; 00402), which did not specify that fees were limited to boat launching and camping;

3. The undisputed presence of an "iron ranger" fee collection box stating "$2 fee" at the Yorty Creek swim area parking lot, located remotely from a boat launch site or campground (1 ER 00033/59:18-61:2; 00078/56:19-00079/59:5; 00172/102:24-103:17; 00211/89:22-24; 00236/55:12-21; 00276/51:5-21; 2 ER 00364/70:11-71:18; 00397). The reasonable inference of this evidence, construed in Colin's favor, is that fees collected in this box were received for recreational purposes like Colin's at Yorty Creek.

4. The undisputed presence of fee-payment envelopes next to the "iron ranger" titled "Self-Deposit *Day-User* Fee Permit" (2 ER 00410, emphasis added);

5. An order by the Army Corps of Engineers, effective March 1, 1994, that the public would be charged "recreation user fees" for swimming beaches at facilities including the Lake Sonoma Recreation Area. (2 ER 00399-00403);

6. Testimony of Yorty Creek visitors that they believed that the two-dollar fee was for recreational purposes including parking, swimming, and using the picnic facilities and beach. (1 ER 00033/61:23-00034/62:13; 00056/37:1-16; 00106/31:12-16; 2 ER 00312/23:25-25:4);

7. Testimony from a government ranger that he was not sure by what means a visitor would know that a day-use fee was *not* required at Yorty Creek. (2 ER 00343/45:3-10);

8. Evidence that the government received fees from visitors renting campsites and launching boats from the marina and elsewhere, which fees entitled visitors to use the designated swim area at Yorty Creek and engage in day-use recreational activities like Colin's. (1 ER 00170/92:20-23; 1 ER 00236/57:1-17; 1 ER 00205/57:16-58:6; 2 ER 00341/31:24-32:10; 2 ER 00463, 00469).

Under the terms of the statute, the government is not allowed to maintain its immunity for any recreational purpose if it receives consideration from others for recreational purposes of any kind. This evidence and its reasonable inferences, taken in Colin's favor, raised a genuine issue of material fact regarding the government's receipt of consideration from others for recreational purposes.

C. The court of appeals improperly applied summary judgment standards and usurped the role of fact finder in deciding the fact question whether Colin's injury took place on a "lake" or on a "river or stream."

The California Resort Act, Cal. Health & Safety Code § 116000, *et seq.*, establishes a standard of care that is breached by the failure to comply with the specific duties imposed by its provisions. The requirements of the Resort Act are not superseded by any recreational immunity afforded by Civil Code § 846. *Donaldson v. U.S.*, 653 F.2d 414, 418 (9th Cir. 1981). Under the Resort Act, the government may be held liable for its negligence in causing Colin's injuries, recreational immunity notwithstanding. *Donaldson v. U.S.*, supra, 653 F.2d at 418.

The court of appeals concluded that the California Resort Act did not apply "because the accident occurred on an artificially created lake, not a river or stream." (App. 2). This factual conclusion again demonstrates the court of appeals' tendency to engage in fact finding, disregarding contradictory evidence and inferences and violating the bounds of its role on summary judgment.

The Ninth Circuit Court of Appeals has held that for purposes of determining whether the California Resort Act applies, the issue whether an injury site at a reservoir is on a "lake," on a "river," or both is a question of fact. *Donaldson v. U.S.*, 653 F.2d 414 (9th Cir. 1981). As a result, a court cannot grant summary judgment on the application of the Resort Act where the evidence on that question is in dispute. Yet, the Ninth Circuit Court of Appeals did precisely that.

The court of appeals offered no support, citation to evidence in the record, or explanation for its finding that the injury site occurred on a lake. Significantly, the court of appeals' conclusion directly contradicted undisputed evidence that the site of Colin's injury was on the inlet formed where Yorty Creek began to flow into the reservoir. A "creek" is "a small stream." *American Heritage Dictionary of the English Language* (4th Ed. 2000).

Although the district court held, and the government agreed, that a current or "flow" is the distinguishing characteristic of a river or stream, the court of appeals overlooked or disregarded evidence which raised a genuine issue of fact about the flow of water through the reservoir. Evidence from the park manager, the government's own witness, established that:

1. The reservoir was fed by water flowing from Warm Springs Creek, Dry Creek, Yorty Creek, and several other subsidiary creeks, and that water flowed out of the dam to Dry Creek, to the Russian River, and ultimately to the Pacific Ocean (1 ER 00168/82:16-83:13);

2. With the creation of the dam, the reservoir became "a temporary holding area" for water flowing from Warm Springs Creek over the dam into Dry Creek (1 ER 00168/83:21-24); and

3. On June 15, 1997, the day of the Colin injury, government records showed that the "inflow" from various stream sources into the reservoir was seven cubic feet per second, and that the "outflow" from the reservoir into Dry Creek was ninety-seven cubic feet per second

> (1 ER 00169/85:11-86:6), or 2.6 million gallons per hour.

The court of appeals ignored the reasonable inference from this evidence that water flowed continuously from one end of the reservoir to the other, and thus that the reservoir was not a standing body of water but instead a widened stream or river. Moreover, the court of appeals ignored the presumption which it itself suggested in *Donaldson v. U.S.*, 653 F.2d at 417, that in the context of application of the Resort Act, in the absence of undisputed evidence the court is required to infer to the petitioner's benefit that the reservoir is "still part of the river which it dams."

In reaching its decision, this Court overlooked that evidence in the petitioner's favor. Alternatively, the Court rejected favorable evidence or failed to draw reasonable inferences from it to the petitioner's benefit, thereby improperly applying the standard on summary judgment.

Intervention by this Court is necessary to prevent courts of appeals from misusing summary judgment in this fashion. The importance of the correct processing of summary judgment motions in federal courts cannot be underestimated. Increasingly, federal jurisprudence derives from summary judgment decisions in federal civil cases. Hon. Patricia Wald, *Summary Judgment at Sixty: 1998 Federal Practice and Procedure Symposium*, 76 Tex. L. Rev. 1897 (1998). "[S]ummary judgment has assumed a much larger role in civil case dispositions than its traditional image portrays or even than the text of Rule 56 would indicate, to the point where fundamental judgments about the value of trials and especially trials by jury may be at stake." *Id.* at 1898.

Moreover, analysis of the disposition of cases by summary judgment in federal courts during a twelve-month period during 1997-1998 revealed that over one-third of the published decisions in the Federal Reporter (167 appeals, or 35.5%) were reversals of district court decisions granting summary judgment erroneously.[2] Paul W. Mollica, *Federal Summary Judgment at High Tide*, 84 Marq. L. Rev. 141 (2000). This statistic suggests that the failure of federal courts to apply summary judgment standards correctly, as reflected in this case, is widespread, detrimental to the goal of expeditious justice, expensive to the judicial system and litigants, and devastating to claimants whose access to a full trial has been improperly, prematurely, and unfairly terminated.

In the instant case, petitioner Aroldo Colin suffered a profoundly severe injury which has effectively sentenced him to a lifetime in a wheelchair, dependent on those around him for the most basic living functions. In seeking redress for his injuries in federal court, he has sought only to have his case decided in accordance with the fair and accurate application of the law. By making its own factual determinations about his case, and by failing to apply the standards for summary judgment as the law requires, the Ninth Circuit Court of Appeals has failed in its obligation to do justice. The court of appeals' failure to apply summary judgment properly harms not only the petitioner, who has no further recourse despite blatant error by the

[2] This statistic also raises serious concern for those litigants whose cases were erroneously disposed of by summary judgment in district court but who did not have the resources to pursue an appeal.

court of appeals, but also all other litigants whose day in court is unjustly and wrongly denied them.

CONCLUSION

The failure of the Ninth Circuit Court of Appeals to adhere even marginally to enunciated summary judgment standards, its failure to apply the correct standards in its review of the district court's grant of summary judgment, and its willingness to decide questions of fact which are properly left to the ultimate fact finder, violates the federal judicial duty to decide genuinely contested issues of fact in open court with live witnesses subject to cross-examination. For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: July 29, 2003

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AROLDO COLIN, Plaintiff-Appellant, v. UNITED STATES OF AMERICA, Defendant-Appellee.	No. 01-17107 D.C. No. CV-99-05045-EDL MEMORANDUM * (Filed Mar. 03, 2003)

Appeal from the United States District Court
for the Northern District of California
Elizabeth D. Laporte, Magistrate, Presiding

Argued and Submitted January 16, 2003
San Francisco, California

Before: SCHROEDER, Chief Judge, GOODWIN and CLIFTON, Circuit Judges.

Plaintiff Aroldo Colin appeals the district court's order granting summary judgment and order denying reconsideration of its summary judgment in favor of the United States in Colin's action under the Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1). Colin seeks damages for a spinal cord injury suffered on government land when the branch of a dead tree he was climbing in 1997 collapsed, causing him to fall into shallow water. Colin alleges that the

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

United States, through its agent the Army Corps of Engineers, is liable for its failure to prune the trees and post warnings against climbing on dead trees at the Lake Sonoma, Yorty Creek Recreation Area.

The district court did not err in holding that there had been no showing of government willful misconduct as required under California Civil Code § 846. The evidence showed negligence at best.

The district court was also correct as a matter of law in holding that the negligence standard did not apply under the "consideration" exception in the statute. The language of the statute shows the legislative intent to limit liability under the section to the uses or areas for which consideration is given. All reported decisions agree. *See Casas v. United States,* 19 F.Supp.2d 1104, 1108 (C.D.Cal. 1998); *Hannon v. United States,* 801 F.Supp. 323, 327 (E.D.Cal. 1992); *Judd v. United States,* 650 F.Supp. 1503, 1512 (S.D.Cal. 1987). The use fees collected at this recreation area were for boat launches and overnight use of the campgrounds. No fees were charged for swimming, picnicking, or any of the uses in which the plaintiff was engaged.

The California Resort Act, establishing certain requirements for owners of resorts on rivers and streams, did not apply here because the accident occurred on an artificially created lake, not a river or stream.

AFFIRMED.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 01-17107
CT/AG#: CV-99-05045-EDL

AROLDO COLIN

Plaintiff-Appellant

v.

UNITED STATES OF AMERICA

Defendant-Appellee

APPEAL FROM the United States District Court for the Northern District of California (San Francisco).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California (San Francisco) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered March 3, 2003.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

AROLDO COLIN,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

/

No. C-99-5045 EDL

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

(Filed May 17, 2001)

INTRODUCTION

Plaintiff Aroldo Colin filed suit for negligence and willful misconduct against Defendant United States of America to recover for serious injuries sustained when he dove from a tree at the Yorty Creek Swim Area at Lake Sonoma. Plaintiff claims that Defendant is liable under the Federal Tort Claims Act, 28 U.S.C. § 1346(b), for: (1) failing to remove or properly maintain dead trees adjacent to the water at the area, despite knowing that the trees were used by swimmers; (2) failing to sound the depths of the water and determine the presence and nature of dangerous obstructions as required by the California Resort Act, California Health and Safety Code §§ 116000, *et seq.*; and (3) failing to warn of such hazards.

Defendant moved for summary judgment, contending that California Civil Code section 846 renders the United States immune from liability. Defendant further contends that the California Resort Act does not apply to Lake Sonoma.

The Court held a hearing on April 3, 2001. Both parties appeared through their counsel of record. Upon consideration of the parties' arguments at the hearing and their submissions, and for the reasons set forth below, the Court enters the following order.

FACTUAL BACKGROUND

The following facts are undisputed. In the late afternoon of June 15, 1997, Plaintiff, a twenty-year old male, and a number of his friends and cousins gathered at City Park in Cloverdale, California, to drink beer, barbecue and hang out. Decl. of Scott T. Nonaka ("Nonaka Decl.") Ex. F (J. Lopez Dep.) at 28:14-29:14; Nonaka Decl. Ex. C (M. Lopez Dep.) at 29:8-30:5. Plaintiff recalls consuming four or five beers at City Park. Nonaka Decl. Ex. A (A. Colin Dep.) at 77:12-15. After a couple of hours, Plaintiff and about ten of his cousins and friends left City Park and drove to Yorty Creek at Lake Sonoma Warm Springs Dam ("Lake Sonoma"). The group took several cars and Plaintiff drove one of them. Nonaka Decl. Ex. G (C. Menicucci Dep.) at 18:22-19:14. They arrived at around 6:30 or 7:00 in the evening. *Id.*

Shortly after arriving at Lake Sonoma, Plaintiff, Manuel Lopez, Ricky Lopez and Joel Lopez decided to swim across the lake and jump out of a tree whose limbs extended out over the water. Decl. of John DeMeo ("DeMeo Decl.") Ex. M (M. Lopez Dep.) at 35:2-36:3. Plaintiff got to the tree first, climbed to the lowest branch and jumped. Nonaka Decl. Ex. B (M. Lopez Dep.) at 39:6-7. Manuel did the same. *Id.* at 39:7-11. Plaintiff climbed the tree again, but climbed to a higher branch, which he estimated was fifteen feet high. Nonaka Decl. Ex. A (A. Colin Dep.) at

71:12-14. According to Plaintiff's cousins, the branch broke and Plaintiff fell headfirst into shallow water. Nonaka Decl. Ex. B (M. Lopez Dep.) at 48:24-49:26. The water depth was approximately four feet. DeMeo Decl. Ex. W. Tragically, Plaintiff suffered a spinal cord injury and is now a quadriplegic. *See* Nonaka Decl. Ex. J.

LEGAL ANALYSIS

A. Summary Judgment Standard

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Material facts are those that may affect the outcome of the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is "genuine" if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *See id.* The court may not weigh the evidence. *See id.* at 255. Rather, the nonmoving party's evidence must be believed and "all justifiable inferences must be drawn in [the nonmovant's] favor." *United Steelworkers of America v. Phelps Dodge Corp.*, 865 F.2d 1539, 1542 (9th Cir. 1989) (en banc) (citing *Liberty Lobby,* 477 U.S. at 255).

The moving party bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the pleadings, depositions, interrogatory answers, admissions and affidavits, if any, that it believes demonstrate the absence of a genuine issue

of material fact. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). Where the nonmoving party will bear the burden of proof at trial, the moving party's burden is discharged when it shows the court that there is an absence of evidence to support the nonmoving party's case. *See id.* at 325.

A party opposing a properly supported motion for summary judgment "may not rest upon the mere allegations or denials of [that] party's pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *Liberty Lobby,* 477 U.S. at 250. However, the opposing party need not produce evidence in a form that would be admissible at trial in order to avoid a summary judgment. *See Celotex,* 477 U.S. at 324. Nor must the opposing party show that the issue will be resolved conclusively in its favor. *See Liberty Lobby,* 477 U.S. at 248-49. All that is necessary is sufficient evidence supporting the asserted factual dispute and requiring a jury or judge to resolve the parties' differing versions of the truth at trial. *See id.*

B. Federal Tort Claims Act

The Federal Tort Claims Act ("FTCA") renders the United States liable for "injury . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1); *Yanez v. United States,* 63 F.3d 870, 872 (9th Cir. 1995). Under the FTCA, the substantive law of the forum state applies. *Richards v.*

United States, 369 U.S. 1, 9 (1962). Accordingly, California law applies. 28 U.S.C. § 2674; *Yanez,* 63 F.3d at 872.

C. California Civil Code section 846

The California Recreational Use Statute, California Civil Code section 846, provides:

> An owner of any estate or any other interest in real property . . . owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose or to give any warning of hazardous conditions, uses of, structures, or activities on such premises to persons entering for such purpose, except as provided in this section . . . .
>
> This section does not limit the liability which otherwise exists (a) for willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity; or (b) for injury suffered in any case where permission to enter for the above purpose was granted for a consideration other than the consideration, if any, paid to said landowner by the state, or where consideration has been received from others for the same purpose; or (c) to any persons who are expressly invited rather than merely permitted to come upon the premises by the landowner.

Cal. Civ. Code § 846.

It is undisputed that Plaintiff was using the land for recreational purposes when his injuries occurred. *See* Mem. of P & A in Supp. of Pl.'s Opp'n to Def.'s Mot. for Summ. J. at 5:20-21 ("Pl.'s Opp'n"). In fact, Plaintiff went to Lake Sonoma to "cool down" and "go swimming." *See* DeMeo Decl. Ex. D (A. Colin Dep.) at 56:9-18.

Because the FTCA renders the United States liable only to the extent that a private individual would be under like circumstances, California Civil Code section 846 applies to the United States where, as here, it is sued as a landowner. *See Mattice v. United States,* 752 F. Supp. 905, 909 (N.D. Cal. 1990) (citing *Toomey v. United States,* 714 F. Supp. 426, 428 (E.D. Cal. 1989) (although § 846 does not apply to property owned by California public entities, it does apply to property owned by the United States because under the FTCA "the federal government's liability is to be determined by a private person standard")).

Therefore, Plaintiff may only prevail against the United States as a landowner where it raises a genuine issue of material fact as to the existence of one or more of the three exceptions to immunity under section 846: willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity; the provision of consideration for permission to enter the property; or an express invitation to enter. *See* Cal. Civ. Code § 846. Here, Plaintiff properly concedes that he was not expressly invited to the property within the meaning of the statute. *See* Pl.'s Opp'n at 5, fn.1; *Ravell v. United States,* 22 F.3d 960, 962-63 (9th Cir. 1994) (personal invitation required). Therefore, the Court will address the first two exceptions only.

1. Willful or Malicious Failure to Guard or Warn Against a Dangerous Condition, Use, Structure or Activity

"The meaning assigned to willful misconduct by the California courts is any intentional act of an unreasonable character undertaken in disregard of a known risk or a risk so obvious that the actor must be taken to have been

aware of it, and so great as to make resulting harm highly probable." *Spires v. United States,* 805 F.2d 832, 834 (9th Cir. 1986) (citing *Rost v. United States,* 803 F.2d 448, 451 (9th Cir. 1986)). Willful or malicious conduct is not presumed. The plaintiff has the burden to "specify the particular acts upon which the willful misconduct of the person that is charged." *Charpentier v. Von Geldern,* 191 Cal. App. 3d 101, 108 (1987).

To establish willful or malicious misconduct, three essential elements must be present: "(1) actual or constructive knowledge of the peril to be apprehended; (2) actual or constructive knowledge that injury is a probable, as opposed to possible, result of the danger; and (3) conscious failure to avoid the peril." *Spires,* 805 F.2d at 834 (citing *Morgan v. Southern Pacific Transp. Co.,* 37 Cal. App. 3d 1006, 1012 (1974)). Constructive knowledge is measured by an objective standard: "whether a reasonable man under the same or similar circumstances as those faced by the actor would be aware of the dangerous character of his conduct." *Rost,* 803 F.2d at 451 (citing *Chappell v. Palmer,* 236 Cal. App. 2d 34, 37 (1965)).

Here, Plaintiff contends that the government (1) had actual or constructive knowledge of the peril posed by climbing, jumping and diving from trees at the water's edge at Lake Sonoma; (2) had actual or constructive knowledge that injury was a probable result of the danger, relying on the fact that the government knew that the Yorty Creek swim area was a popular swimming spot and that park visitors climbed, jumped and dived from trees at the water's edge; and (3) consciously failed to avoid the peril, despite a written policy mandating the removal of dead trees and rope swings, as well failed to post signs

warning of the danger of jumping or diving from trees into the shallow water.

a. Actual or Constructive Knowledge of the Peril to be Apprehended

Plaintiff argues that the government had actual or constructive knowledge of the peril posed by climbing jumping and diving from trees at the Yorty Creek swim area. The evidence shows and Defendant concedes that it had general knowledge of the peril posed by climbing, jumping and diving from trees at Yorty Creek. *See* Def.'s Mem. of P & A in Reply to Pl.'s Opp'n to the Mot. for Summ. J. at 3:17-19 ("Def.'s Reply"). Defendant argues, however, that it did not have actual or constructive knowledge of the peril posed by climbing, jumping and diving from the specific tree from which Plaintiff fell.

It is undisputed that park rangers at Lake Sonoma were aware that swimmers would jump and dive from trees at the water's edge. *See* DeMeo Decl. Ex. G (T. Golden Dep.) at 47:22-49:23; DeMeo Decl. Ex. H (M. Griffin Dep.) at 47:25-48:4; DeMeo Decl. Ex. Q (K. Rios-Peterson Dep.) at 87:19-88:18. The evidence further shows that park rangers considered such activity dangerous and were instructed to warn visitors of the dangers associated with jumping or diving from trees. *See* DeMeo Decl. Ex. Q (K. Rios-Peterson Dep.) at 88:7-18; DeMeo Decl. Ex. J (S. Leonard Dep.) at 17:16-23. Furthermore, the problem of park visitors climbing, jumping and diving from trees at the water's edge was discussed during ranger meetings conducted by either the park's manager or the senior park rangers. *See* DeMeo Decl. Ex. V (S. Wilson Dep.) at 65:9-66:12; DeMeo Decl. Ex. J (S. Leonard Dep.) at 29:3-22.

The evidence also establishes that park rangers considered the dead trees and limbs in the park to be a dangerous condition. *See* DeMeo Decl. Ex. F (P. Crowley Dep.) at 69:23-71:18; DeMeo Decl. Ex. J (S. Leonard Dep.) at 24:14-20. In fact, a written policy mandated the removal of dead trees as personnel were available. DeMeo Decl. Ex. Y.

Defendant contends, however, that Plaintiff has failed to raise a triable issue of fact as to actual or constructive knowledge of the peril because Plaintiff failed to show that Defendant knew that the particular tree that Plaintiff fell from was dead or that people had been jumping from it. *See Judd v. United States,* 650 F. Supp. 1503, 1512 (S.D. Cal. 1987) (finding no willful or malicious misconduct, in part, because there was no evidence that Forest Service personnel actually knew that persons dove from the very high rock from which the plaintiff attempted to dive, as opposed to the lower rocks which they knew people used). Park Manager Peter Crowley testified that if he were aware that people were jumping from a particular dead tree, he would have had it removed, but that he was not aware that people were jumping from the tree from which Plaintiff fell. Nonaka Decl. Ex. L (P. Crowley Dep.) at 70:23-71:18. Similarly, Park Manager Steven Leonard testified that although he knew there were some dead trees in the area of the accident, he does not recall any reports that people were climbing those trees. Nonaka Decl. Ex. Q (S. Leonard Dep.) at 35:2-25.

The Court is not persuaded that Defendant must know that the very tree from which Plaintiff fell was a particular hazard when it admittedly knew that visitors were jumping from trees in the Yorty Creek area and that there were dead trees in the immediate vicinity. This

evidence, however, does go to the issue of whether Defendant consciously failed to avoid the peril or took sufficient steps to limit the danger to defeat any triable issue of material fact on willfulness.

b. Actual or Constructive Knowledge that Injury Was a Probable, as Opposed to Possible, Result of the Danger

Plaintiff argues that the government had actual or constructive knowledge that injury was a probable result of jumping or diving from trees. Defendant makes several arguments in response, some more persuasive than others. Defendant again argues that it did not have the requisite actual or constructive knowledge that injury was a probable result from jumping or diving from the tree from which Plaintiff fell. Again, the Court is not persuaded that Defendant must know that injury was a probable result of jumping or diving from the particular tree from which Plaintiff fell.

More persuasively, Defendant argues, and Plaintiff concedes, that there had been no similar accidents at Yorty Creek prior to Plaintiff's. The only evidence of any accident from jumping or diving from a tree at the Yorty Creek swim area included a minor, unreported injury. *See* DeMeo Decl. Ex. P (J. Menicucci Dep.) at 32:10-23. Peter Crowley, Park Manager since 1996, did not recall anyone being injured at the park due to swinging from trees or jumping from tree limbs into the lake. *See* Nonaka Decl. Ex. L (P. Crowley Dep.) at 37:6-13. Similarly, Tom Golden, Park Ranger since 1996, did not know of any injuries occurring from jumping or diving out of trees. Nonaka Decl. Ex. M (T. Golden Dep.) at 24:20-25:7. Susan Wilson, Park Ranger

since 1990, also testified that she did not know of any previous accident before Plaintiff's incident where anyone was injured from jumping from a tree. Nonaka Decl. Ex. O (S. Wilson Dep.) at 25:2-10.

This lack of *any* previous accident that would put Defendant on notice that injury was a probable result of jumping or diving from trees at Yorty Creek, while not by itself conclusive, cuts strongly against any triable issue of fact on willfulness. The courts have relied heavily on the defendant's knowledge of prior accidents or lack thereof in ruling on this element, even though by itself neither is determinative.

For example, in *Finneman v. United States Dept. of Transp.*, 1994 WL 172253, *4 (N.D. Cal. 1994), the plaintiff sustained several injuries when his bicycle struck the edge of a wooden plank on a trench and was thrown to the ground. The court granted the defendant's motion for summary judgment on the ground that there was no evidence that the plaintiff's injuries were probable in view of the fact that several other cyclists rode over the trench safely. *Id.; see also Toomey v. United States,* 714 F. Supp. 426, 428 (E.D. Cal. 1989) (finding no evidence of willful misconduct, in part, because prior to the plaintiff's accident there had been no reported accidents involving the peril).

Conversely, the court in *Von Tagen v. United States,* 557 F. Supp. 256, 260-61 (N.D. Cal. 1983), denied the defendant's motion for summary judgment based, in part, on evidence of prior accidents. There, the plaintiff submitted reports of seven similar accidents that occurred prior to the plaintiff's accident. The court held that the accident reports were evidence from which a trier of fact could infer

that the government had knowledge of the hazard and of the probability of injury, especially since the defendant did not submit evidence to refute these inferences. *Id.* at 261.

By contrast, in *Mattice v. United States,* 969 F.2d 818 (9th Cir. 1992), even though there had been nine accidents on the mountain road on which the plaintiff was injured, the court found lack of actual or constructive notice of the danger because none of the accidents occurred at the particular overlook where the plaintiff was injured or were caused by breaking through the guardrail, as the plaintiff had. *Id.* at 823. Further, even the government's knowledge of prior damage to the guardrail showing that it had been hit before was not enough to create a triable issue of fact as to the knowledge of the probability of injury because: "None of the vehicles went through the guardrail, however, and there [was] no evidence that anyone was injured." *Id.* at 823.

Plaintiff attempts to minimize the significance of the lack of prior accidents by referring to language that "abnormally favorable results" do not automatically negate liability. *See Rost,* 803 F.2d at 451; *see also Lostritto v. Southern Pacific Transp. Co.,* 73 Cal. App. 3d 737, 745 (1974) ("adventitiously few" prior accidents). While it is true that a plaintiff can make the requisite showing of probability despite the lack of prior accidents, the plaintiff can only do so through other evidence of an especially dangerous situation that shows that the lack of prior accidents is indeed *abnormally* favorable. In *Rost,* the government knew that a dangerously bent steel crossbar on a gate on a road protruded nine inches into oncoming traffic and arguably needed to be repaired, yet failed to do so for one year. *Id.* at 451. The court concluded: "The safety margin of nine inches is so inconsequential under

these facts as to make it not only probable but certain that injury would follow." *Id.*[1] This unusually strong showing of the proverbial "accident waiting to happen" overcame the lack of prior accidents during the year that the government failed to repair the gate. By contrast, here there is no evidence of such an abnormally dangerous condition, and the hazard of swimmers at Lake Sonoma jumping from dead trees existed for much longer than a single year without causing any known accident.

In *Lostritto, supra,* the evidence showed a newspaper report of a prior *fatal* accident from a similar dive off the railroad trestle where the plaintiff was injured, as well as a lifeguard's report to the railroad that several people had been injured diving and jumping from the trestle. *Lostritto,* 73 Cal. App. 3d at 744-45. The Court relied on this evidence in rejecting the railroad's argument that it had no notice of the high probability of harm, and commented that "the matter of probability is not to be assessed solely by the number of prior accidents, which adventitiously may have been *few,* but by all the circumstances." *Id.* at 745 (emphasis added). Here, Defendant did not even know of one prior accident, much less a fatal one. Further, the other circumstances on which Plaintiff relies do not raise a triable issue of fact that Defendant had actual or constructive knowledge that injury was a probable, as opposed to possible, result. Even assuming that Plaintiff did raise a

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[1] Plaintiff also cites to a report that notes that unreported accidents must be presumed to have occurred. *See* DeMeo Decl. Ex. VV. This obvious proposition bears on the first element, actual or constructive knowledge of the peril. It does not show that Defendant knew injury was probable, as opposed to possible.

triable issue of fact on the second element, the Court concludes below that he did not do so as to the third element, conscious failure to avoid the peril.

c. Conscious Failure to Avoid the Peril

Plaintiff argues that Defendant's steps so inadequately protected against a known danger that the failure to warn could be considered willful. Defendant argues that the Army Corps took sufficient affirmative steps to prevent accidents of this kind from occurring to avoid a triable issue of fact as to willfulness, even if arguably the steps were tantamount to negligence.

The government presented evidence that park rangers patrolled the Yorty Creek area, on boat and by truck, and if a ranger witnessed a visitor jumping or diving from a tree, the ranger warned the visitor of the dangers associated with jumping and diving from trees. The visitor was also told that it was not safe and to get out of the tree. *See* Nonaka Decl. Ex. O (S. Wilson Dep.) at 66:6-19; Nonaka Decl. Ex. Q (S. Leonard Dep.) at 17:6-19; DeMeo Decl. Ex. X at ¶ 4. According to Defendant, such patrolling occurred every day, *see* Nonaka Decl. Ex. O (S. Wilson Dep.) at 12:1-5, and during the summer months three or four times a day, *see* Nonaka Decl. Ex. P (E. Pierce Dep.) at 56:4-57:11. Plaintiff is correct that the precise frequency of the patrols is unclear. While Park Ranger Eric Pierce testified that rangers patrolled the area three to four times a day in the busy season, DeMeo Decl. Ex. S (E. Pierce Dep.) at 56:4-8, Park Manager Perry Crowley testified that there was one patrol in the morning and one patrol in the late afternoon. DeMeo Decl. Ex. F (P. Crowley Dep.) at 90:2-12. Plaintiff's witnesses testified that they rarely saw rangers at Yorty

Creek and those rangers just drove through the parking lot without getting out of their vehicles. *See* DeMeo Decl. Ex. O (C. Menicucci Dep.) at 37:19-38:17 ("[rangers] are not there a lot"); DeMeo Decl. Ex. M (M. Lopez Dep.) at 54:10-57:17 (rangers are present, but "don't ever get off their trucks, they just cruise."). These witnesses did not state, however, that they ever saw the rangers observe them or anyone else climbing or jumping from trees, but failed to warn them to stop. Furthermore, because patrolling, by its very nature, is sporadic, the fact that these witnesses' visits did not coincide with the patrols is not inconsistent with the government's evidence of patrols of at least twice a day in summer, as summer days are long. Accordingly, this evidence does not rise to the level of a material dispute of fact when considered in combination with the other evidence, including the fact that the patrols were not the only method of warning the public.

In addition to the patrols, a sign was posted at the Yorty Creek picnic area warning: "Swim At Your Own Risk." *See* Nonaka Decl. Ex. H (J. Menicucci Dep.) at 29:25-30:4.[2] Plaintiff argues that no signs were posted specifically warning of the danger of dead trees or limbs, let alone the dangers of climbing, jumping or diving from such trees. DeMeo Decl. Ex. H (M. Griffin Dep.) at 48:10-17. Yet a warning against the risk of swimming would encompass, *a fortiori,* jumping off a tree to swim in the

[2] Another sign read "Caution Lake Water Level Varies Watch For Obstructions." *Id.* at 37:17-38:7. This sign was located at the boat ramp and was not necessarily visible to swimmers. DeMeo Decl. Ex. WW; *see also* DeMeo Decl. Ex. F (P. Crowley Dep.) at 200:10-27.

water below. At most, the failure to post more or different warning signs may be negligent.

Plaintiff also argues that the government failed to remove dead trees and dead limbs, despite a written policy in the Lake Sonoma Safety Plan providing for their removal:

> Dead tree and dead limbs in established Recreation Areas will be removed as people power is available. Trees being used as 'rope swings' will be removed. Ropes will be immediately removed from such trees.

DeMeo Decl. Ex. Y. The designated swimming area at Yorty Creek was marked off with a buoy line. DeMeo Decl. Exs. X, KK. It is undisputed that Plaintiff left this designated area and swam beyond the buoy lines to a tree 150 yards from the swimming beach that was in a wildlife management area. *Id.*

Park Manager Perry Crowley testified that the area where Plaintiff dove was not within the "recreation area" for purposes of this policy, since it was across from the developed swimming area. DeMeo Decl. Ex. F (P. Crowley Dep.) at 68:22-69:11. According to Park Manager Steven Leonard, however, the tree from which Plaintiff dove was within the recreation area. DeMeo Decl. Ex. J (S. Leonard Dep.) at 58:3-22. Even assuming that the policy applied in the area where Plaintiff fell, the uncontradicted evidence shows that the purpose underlying the policy was to protect those below from being injured by falling tree limbs, rather than to protect those climbing the tree since they were not supposed to do so. DeMeo Decl. Ex. J (S. Leonard Dep.) at 24:7-20.

More importantly, the policy about tree removal must be read in light of the uncontradicted evidence of the wildlife management policy that required preserving trees in the Yorty Creek area. Approximately 8,000 acres of Lake Sonoma, or roughly half of the park, is designated as a wildlife management area, including Yorty Creek. *See* Decl. of Perry Crowley in Resp. to Pl.'s Opp'n to Def .'s Mot for Summ. J. at ¶ 3. Trees ringing Yorty Creek are preserved as habitat for fish; as the lake level rises during the fall and winter months, the trees are submerged. *Id.* ¶ 4. The issue here is whether Defendant's conduct went beyond mere negligence to willful failure to avoid the peril. Even assuming that the policy applied to trees in the Yorty Creek area, not just the designated swimming area, which seems unlikely, any noncompliance with the policy would not rise to the level of willfulness given the competing policy of preserving wildlife habitat.

Significantly, Plaintiff did not fall from a tree with a rope swing or steps on it. If he had, he may well have raised a triable issue of fact as to whether Defendant engaged in willful misconduct by failing to remove what amounted to manmade and readily apparent attractive nuisances.

Furthermore, in every case cited by Plaintiff where summary judgment was properly denied or the plaintiff prevailed at trial on the issue of willful misconduct, the evidence showed far more egregious inaction by the defendant in the face of a serious peril well known to (and sometimes created by) the defendant, yet hidden from or unavoidable by the plaintiff. As the Ninth Circuit has observed, cases that "have upheld a claim of willful misconduct under California law have all involved a hidden peril." *Mattice v. United States,* 969 F.2d 818, 822 (9th Cir.

1992). Conversely, evidence that a risk is obvious is "a double-edged sword" because it justifies the landowner in assuming that visitors will take the danger into account, reducing the need to warn or take precautions. *See id.* at 822.

For example, in *Miller v. United States,* 945 F.2d 1464 (9th Cir. 1991), the plaintiff was injured while riding his motorcycle down a roadway that suddenly disappeared. No warning signs, barricades or other notices alerted drivers of the danger or prevented them from encountering the dangerous condition. *Id.* at 1467. The defendant admitted that it knew of the absence of the road in that area; knew that the roadway was used by off-road vehicles; knew that the absence of the road created a dangerous condition to recreational users of the road; and failed to warn of the dangerous condition. *Id.* Further, there was a genuine issue of material fact as to whether agents of the United States had removed the culvert, thereby creating the dangerous condition. *Id.* at 1466 n.2. Based on this evidence, the Ninth Circuit reversed the district court's decision granting summary judgment and remanded the case.

Rost v. United States, 803 F.2d 448, 451 (9th Cir. 1986), also involved a hidden, manmade peril. There, the plaintiff was severely injured on a United States Forest road when he was impaled on a crossbar on a closure gate that had been bent out of shape into a "lance-like" point. The gate was camouflaged to drivers since it was dark green, unlighted, without warning signs, located at a curve in the road and backed up against flora. *Id.* at 451. Further, the defendant had known of the gate's bent and dangerous condition for at least a year before the accident,

yet failed to repair it. *Id.* The Ninth Circuit affirmed the district court's finding of willful misconduct.

Similarly, in *MacLeod v. United States,* 1994 WL 860798 (C.D. Cal.), the plaintiffs suffered injuries when lightening struck a building and electrocuted the inhabitants. The building, located on the summit of Mt. Whitney, was used as a shelter for scientists conducting astronomical research and by hikers who sought shelter during storms. *Id.* at *1,4. The court held that the government's actions constituted willful misconduct because the defendant knew that people were using the building as a shelter; knew that the injury was a probable result; and failed to remedy the situation even though the defendant possessed a plan to provide lightning protection for more than three years prior to the accident in question. *Id.* at *8.

In *Termini v. United States,* 963 F.2d 1264, 1265 (9th Cir. 1992), a motorist was injured when his car went over a cliff on a road within a national forest. There, the defendant failed to place any warning signs on a spur road that appeared to be a main road but instead ended abruptly at a cliff. In fact, drivers could not see the peril until they were just forty feet from the precipice. *Id.* The court held that:

> The United States' actions in building and maintaining a road that ends, without warning, at a cliff and which allows absolutely no margin for driver or mechanical error, or for adverse natural conditions, constituted willful and malicious conduct.

Id. at 1266. The court distinguished between the inherent danger of mountain roads in general and the hidden danger of that particular road, finding that the presence of

an unmarked, unforeseeable danger raised the government's failure to warn to the level of willful misconduct. *Id.* at 1267.

By contrast, in *Mattice, supra,* the plaintiff sustained damages when she drove off a cliff at a national park. The court granted the defendant's motion for summary judgment based on lack of willfulness because the inherent risks of driving on a mountain road are obvious and because no hidden peril existed on the road. *Id.* at 822. Unlike *Termini,* the road at issue did not end abruptly at a precipice. *See also Finneman,* 1994 WL 172253 at *4 (finding that there was no hidden peril since the wooden planks lying across the path were readily apparent).

At oral argument, Plaintiff relied on *Soto v. United States,* 748 F. Supp. 727 (C.D. Cal. 1990), where the plaintiff became a quadriplegic when he dove into a pool located in a national forest. Although swimming and diving were officially banned at the pools, hundreds of swimmers and divers swam there every weekend throughout the summer. *Id.* at 729. Unlike here, however, the government in *Soto* made no effort, oral or written, to enforce this ban, even as it vigorously enforced the parking and fire regulations. *Id.* at 731. In fact, there was not even one sign indicating that such activity was prohibited or risky. There was no systematic procedure for the reporting of accidents and none of the district personnel were properly trained in safety procedures. *Id.* Furthermore, just two and a half months before the plaintiff's incident, there was a drowning accident. *Id.* at 730.

Plaintiff also relied on *Caplan v. United States,* 877 F.2d 1314, 1317 (6th Cir. 1989), for the proposition that, unlike other types of natural hazards, the risk created by

unstable dead trees is not as obvious to an invitee as to a landowner. But *Caplan* does not aid Plaintiff. There, the plaintiff was injured when a thirty-foot long dead tree fell and struck him. *Id.* at 1315. All the trees in the area, including the tree that injured the plaintiff, had been injected with herbicide eight years earlier as part of the government's mass herbicide program to clear out low quality trees. *Id.* The hidden peril from the dead trees in *Caplan* went well beyond the normal peril of some trees dying from natural causes as in this case, and, indeed, the government played an active role in killing the trees. Thus, in *Caplan,* the landowner had superior knowledge of the hidden peril by deliberately creating it and such peril was not apparent to an ordinary, reasonable individual who would know of the normal risk of trees dying naturally, but not of the abnormal risk of their mass poisoning.

Here, the dangers of jumping or diving from a tree into an unknown depth of water is open and obvious to a reasonable person. Unlike *Termini* and *Miller, supra,* where a visitor would not know of the potential danger until it was too late to react, here, the dangers of jumping or diving into a lake do not involve a hidden peril in the sense that Ninth Circuit precedent uses that term.

In conclusion, Plaintiff has not raised a material issue of fact that Defendant consciously failed to act to avoid the peril. The fact that Defendant knew of possible dangers but did not take all possible measures to protect the public does not mean Defendant acted willfully or maliciously. *See Hannon v. United States,* 801 F. Supp. 323, 328 (E.D. Cal. 1992). In fact, the evidence shows that Defendant patrolled the area in the summer for compliance with park rules, including telling visitors seen in trees near the lake not to climb or jump, and posted a warning sign near the

swimming area. *Cf. Spires v. United States,* 805 F.2d at 832-33 (9th Cir. 1986) (reversing judgment in favor of the plaintiff who was injured when jogging at night when he fell into a ditch at a storm sewer outfall, even though the government never posted any warnings despite knowing that similar ditches, albeit smaller, had formed periodically in the past and visitors often walked and jogged there at night without flashlights). This evidence, coupled with the lack of *any* prior reported accidents and the lack of a hidden peril shows that Defendant's action did not rise to the level of willfulness. While the evidence viewed in the light most favorable to Plaintiff arguably shows that Defendant acted negligently, negligence is insufficient to overcome section 846 immunity.

2. Consideration Given for Permission to Enter Property

The California Recreational Statute does not extend immunity to landowners where permission to enter the land for recreational purpose was granted for consideration. The rationale for this exception to immunity is that the landowner who derives an economic benefit from opening land to public recreation has an incentive to do so, coupled with some financial ability to take safety precautions; by contrast, the landowner who derives no profit from permitting public recreation would likely close his land to public recreation if faced with liability for mere negligence. *See Ducey v. United States,* 713 F.2d 504, 510-11 (9th Cir. 1983). The term "consideration" may encompass more than a direct entry fee, provided that a benefit is conferred on the landowner. *Howard v. United States,* 181 F.3d 1064, 1069 (9th Cir. 1999); *see also Johnson v. Unocal Corp.,* 21 Cal. App. 4th 310, 316 (1993) ("a present,

actual benefit" must exist) (citing *A.J. Indus., Inc. v. Ver Halen,* 75 Cal. App. 3d 751, 761 (1977)).

It is undisputed that neither Plaintiff nor anyone in his party paid any money to use the lake or recreation area or made any purchases at Lake Sonoma on the date of the accident. Although Plaintiff stated in his deposition that he believed that his brother, Luis Lopez, paid two dollars to enter the recreational area, he admitted that he did not actually see his brother do so and Luis Lopez himself testified that he did not. *See* Nonaka Decl. Ex. E (L. Lopez Dep.) at 31:9-23. Furthermore, Plaintiff's erroneous belief that Lake Sonoma charged a day use fee was based solely on his experience at a *different* park that charged a fee for parking and recreational use. *See* DeMeo Decl. Ex. D (A. Colin Dep.) at 62:16-24. The testimony of several friends and relatives corroborate that neither Plaintiff nor any of his companions paid a fee the day of the accident. *See* Nonaka Decl. Ex. B (M. Lopez Dep.) at 36:12-25; Nonaka Decl. Ex. H (J. Menicucci Dep.) at 30:16-25; Nonaka Decl. Ex. F (J. Lopez Dep.) at 35:11-25; Nonaka Decl. Ex. I (J. Barajas Dep.) at 39:4-17. Furthermore, it is undisputed that the United States did not charge any fee for day use of the swimming and picnic facilities at Lake Sonoma; use like Plaintiff's was free of charge. Rather, the United States only charged a fee for overnight camping and boat launching.

Plaintiff's attempt to rely on *Graves v. United States Coast Guard,* 692 F.2d 71 (9th Cir. 1982) is unavailing. There, the plaintiff sued under the FTCA for injuries from diving off a cabana into a river. He gave money to his traveling companion, who in turn paid the government's lessee for the privilege of camping near the river. *Id.* at 73. The Ninth Circuit held that California Civil Code section

846 did not shield the government from liability because permission to use the land was granted for consideration. The court reasoned that by paying for the cabana, the plaintiff also got access to the river. *Id.* Here, by contrast, Plaintiff and his companions paid no fee to obtain access to the lake, either directly or indirectly.

This case is also unlike *Ducey,* 713 F.2d at 512, where all the plaintiffs had regularly purchased goods from the café-store and all but one had rented boat slips or trailer spaces. Although visitors to the national recreational area paid no direct fee to enter, the Ninth Circuit held that the government's receipt of one and three-fourths percent of its concessionaire's gross annual receipts from sales at the café-store and from boat slip and trailer space rentals located on government property constituted consideration under the Nevada Recreational Use statute immunity exception. *Id.* at 509-10.[3] The Ninth Circuit reasoned that such a broad reading of the statute comported with the general policy of "differentiating the entrepreneur-landowner whose land is open for business reasons from the landowner whom the statute encourages to open his land on a gratuitous basis by the promise of immunity." *Id.* at 514; *but see Jones v. United States,* 693 F.2d 1299, 1303 (9th Cir. 1982) (finding that although the plaintiff paid a

[3] The relevant portion of the Nevada Recreational Statute provides: "this section does not limit the liability which would otherwise exist for . . . (2) injury suffered in any case where *permission to participate* in recreational activities was granted for a consideration. . . . " N.R.S. § 41.510(3)(a)(2). The counterpart provision in the California statute applies to consideration for *permission to enter.* Arguably, "permission to enter" in the California statute imposes a more specific requirement of an entry fee or its equivalent.

fee to rent an inner tube, no fee was charged for entry on the land or for use of the land, rendering the consideration exception inapplicable).

Here, unlike *Ducey, supra,* there is no evidence that Plaintiff purchased anything from any concessionaire at Lake Sonoma, much less paid a fee to the United States. Plaintiff argues that "across the lake from the Yorty Creek Swim Area a private concessionaire leases lake-front land from the Government on which it operates the Lake Sonoma Marina, which includes paid parking and boat launching, rented boat slips, and grocery and fishing tackle stores." Mem. of P & A in Supp. of Pl.'s Opp'n to Def.'s Mot. for Summ. J. at 18, fn.1 (citing to DeMeo Decl. Ex. J (S. Leonard Dep.) at 19:15-20:12). The deposition testimony that he cites, however, makes no reference to either a private concessionaire leasing property from the government or to the existence of a grocery and fishing tackle store. Even assuming the existence of such a store, here, unlike *Ducey,* there is no evidence that Plaintiff ever purchased any goods from any concessionaire at Lake Sonoma either on the day of the accident or, indeed, on any day. Nor did Plaintiff gain the benefit of diving and swimming in the lake through purchases.

Additionally, Plaintiff argues that because the Army Corps charges fees to launch boats at Yorty Creek and to camp overnight at Lake Sonoma, the consideration exception applies. Plaintiff points to no cases, however, that construe the consideration exception so broadly. To the contrary, the court in *Hannon v. United States,* 801 F. Supp. 323 (E.D. Cal. 1992), rejected a similar argument. There, the plaintiff argued that although he paid no fee to enter a recreational area, the payment of fees by others for entry into campgrounds elsewhere within the recreational

area, including the area where the plaintiff was injured, rendered the considerations exception applicable. *Id.* at 327. The court rejected the plaintiff's argument based on the fact that he was not injured at a campsite, nor did he gain access to the site of his injury from a campsite. *See also Judd v. United States,* 650 F. Supp. 1503, 1512 (S.D. Cal. 1987) (consideration exception did not apply even though a fee was charged for use of campsites, because the plaintiff's injury occurred at an undeveloped site one-quarter of a mile away from any campground site); *Casas v. United States,* 19 F. Supp. 2d 1104, 1105-08 (C.D. Cal. 1998) (consideration exception did not apply where the plaintiff entered military station without paying a fee in order to run a race and had not yet paid the fee for the race when injured).

Finally, Plaintiff argues that the considerations exception applies even though the United States does not charge a fee for permission to enter Lake Sonoma, because Lake Sonoma is designated as a United States Fee Area pursuant to Congressional Statute. DeMeo Decl. Ex. QQ. Prior to June 1996, Lake Sonoma was under the jurisdiction of the Army Corps' Sacramento District. In 1994, Congress gave the Army Corps of Engineers the authority to collect camping fees, boat launch fees and day use recreation fees at recreation areas that it operated, including areas like Lake Sonoma. According to the undisputed evidence, however, although the government could have collected day-use fees at Lake Sonoma, it chose not to. *See* Decl. of James Sandner in Resp. to Pl.'s Opp'n to Def.'s Mot. for Summ. J. at ¶ 14.

Plaintiff cites no authority for the proposition that because the United States *could have* charged a fee although it did not, the consideration exception applies. Not

only is there a dearth of precedent for this argument, but it flies in the face of the policy underlying this exception to immunity. The California Legislature conferred immunity from liability for negligence upon landowners who make their property available to the public gratuitously in order to encourage the owners to do so. The Legislature carved out an exception for landowners who gain an economic benefit from allowing recreational use on the theory that the profit incentive would offset the disincentive created by exposure to liability for negligence. Here, the government chose to make Lake Sonoma available for day use without charging any fee and derived no economic benefit from recreational use like Plaintiff's. That the government – like most private landowners – could have charged a fee had it chosen to do so does not alter the basic fact that it did not.

d. California Health and Safety Code §§ 116000, et seq.

Plaintiff argues that Lake Sonoma is a resort within the meaning of the California Resort Act, California Health and Safety Code §§ 116000, *et seq.*. The Resort Act requires resorts to post signs indicating water depth and obstructions. Section § 116010 provides:

> No person shall maintain a resort unless signs indicating in plain letters the depth of the water, the location of pools or eddies, and the presence and direction of currents of water are placed and maintained in the water during the season when bathing and swimming are permitted or invited.

Cal. Health & Safety Code § 116010. The Resort Act defines a "resort" as "any public bathing or swimming place or resort on a river or stream." Cal. Health & Safety

Code § 116000. Section 116005 imposes a duty on resort owners to sound for dangers concerning the water depth and locate the presence of dangerous obstructions in a stream or river.[4]

Although the remedies specified under the statute are criminal, Plaintiff argues that the statute establishes a standard of care that is breached by failure to comply with the specific duties that the statute imposes. Further, as this more specific statute does not irreconcilably conflict with the general immunity conferred by the California Recreational Statute, the Resort Act provisions control. *See Donaldson v. United States,* 653 F.2d 414, 418 (9th Cir. 1981). Therefore, resorts within the meaning of the California Resort Act must comply with its specific duties regardless of the immunity otherwise extended to landowners under the more general provisions of the California Recreational Statute.

The California Health & Safety Code only imposes duties on operators of a "resort" as defined by the statute. Very few cases interpret the definition of "resort." In *Judd v. United States,* 650 F. Supp. 1503, 1510 (S.D. Cal. 1987), the court found that the statute was originally directed at commercial establishments along the Russian River between 1900-1911. The court found that "common sense dictate[d] that a stream or river is not a public bathing or swimming place merely because members of the public

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[4] California Health & Safety Code § 116005 provides: "no person shall maintain a resort unless he or she carefully sounds the depth of water and locates the eddies and pools and determines the presence and nature of dangerous currents, sunken logs, rocks, and obstructions in the stream or river."

bathe or swim there. Rather, one must look at the purpose of the adjacent land owner, which can in part be determined by the access given to the public to the river or stream, and also by any facilities or amenities provided, such as dressing rooms or picnic tables." *Id.* at 1511.

Here, Lake Sonoma may be considered a "swimming place" as it provides the public access to a swimming area and amenities, such as picnic tables. Nothing in the statute specifically requires a property to contain overnight facilities to qualify as a "resort." In any case, overnight camping sites are available at Lake Sonoma.

Plaintiff did not raise a triable issue of fact, however, that Lake Sonoma is either a river or stream. According to Black's Law Dictionary, a river is defined as "a natural stream of water, of greater volume than a creek or rivulet, flowing in a more or less permanent bed or channel, between defined banks or walls, with a current. . . . " Black's Law Dictionary (Sixth Edition). A stream is defined as "a watercourse having a source and terminus, banks, and channel, through which waters flow at least periodically, and it usually empties into other streams, lakes, or the ocean. . . . " *Id.* This definition is consistent with the statute's focus on eddies and currents, which occur in the flowing water of rivers and streams, not the standing water found in lakes. While Lake Sonoma is an artificial lake created by a dam, Plaintiff has not presented any evidence that Lake Sonoma has any currents or is a watercourse through which water flows. Rather, the exhibits attached to the Declaration of DeMeo illustrate a considerable body of standing water. DeMeo Decl. Exs. GG, HH.

Even if Lake Sonoma were a river or stream within the meaning of the statute, it is questionable whether Plaintiff's injury resulted from an occurrence of the nature of which the California Resort Act was designed to prevent. In *Chidester v. United States,* 646 F. Supp. 189, 192 (C.D. Cal. 1986), the court held that the California Resort Act was inapplicable, in part, because the plaintiff was injured in a diving accident and not a drowning accident, the latter being an occurrence of the nature of which the California Resort Act was designed to prevent. *See also Judd v. United States,* 650 F. Supp. 1503, 1510 (S.D. Cal. 1987) (historically, the Act was enacted in response to the public outcry concerning drownings).

Defendant also argues that the California Resort Act is inapplicable based on *Blackburn v. United States,* 100 F.3d 1425, 1535 (9th Cir. 1996), which held that the "application of the Resort Act in the present case would violate the Supremacy Clause by constituting a direct and intrusive regulation by the State of the federal government's operations of its property at Yosernite [sic]." In *Blackburn,* the plaintiff sued for injuries from diving off a bridge in the famed Yosemite National Park. The government raised the "discretionary function" exception to liability under the FTCA. The plaintiff responded that the Assimilative Crimes Act, 18 U.S.C. § 13(a), which "assimilates" certain state crimes into federal crimes when committed on federal land, made the duties of the Resort Act mandatory. *Id.* at 1435. The Court held that the United States could not be liable under such a penal statute absent a waiver of sovereign immunity. *Id.* That holding does not necessarily apply here, where the government does not raise the discretionary function exception and Plaintiff does not rely on the Assimilative Crimes

Act. Instead, Plaintiff contends that the Resort Act sets a civil standard of care for common negligence by resort owners under California law, which applies to the United States through the FTCA. It is also arguable that the other reasons advanced by the Court in *Blackburn* for its conclusion that the Resort Act did not apply to Yosemite's operations were based on the unique nature of national parks such as Yosemite. As the Court observed, over one thousand miles of streams and rivers run through Yosemite and placing signs and safety ropes along those many miles would violate the purpose of preserving its natural beauty. *Id.* at 1435-36 n. 5. By contrast, Lake Sonoma is an artificial lake created by a large man-made dam. In view of this Court's conclusion that the swimming area here is not a "resort" within the meaning of the Act, however, the Court need not decide this argument.

CONCLUSION

For the reasons stated above, Defendant's Motion for Summary Judgment is **GRANTED**.

IT IS SO ORDERED.

Dated: May 17, 2001

/s/ Elizabeth D. Laporte
ELIZABETH D. LAPORTE
United States Magistrate Judge

copies faxed and mailed
to counsel of record

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

AROLOD COLIN

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant. /

No. C-99-5045 EDL

JUDGMENT

(Filed May 18, 2001)

On April 3, 2001, Defendant United States of America's Motion for Summary Judgment came on for hearing, the undersigned Magistrate Judge Presiding. The evidence presented having been fully considered, the issues having been duly heard and a decision having been duly rendered on May 17, 2001,

IT IS ORDERED AND ADJUDGED that Defendant's Motion for Summary Judgment is **GRANTED.** The Clerk shall close the file and terminate all pending motions.

Dated: May 18, 2001

/s/ Elizabeth D. Laporte
ELIZABETH D. LAPORTE
United States Magistrate Judge

copies mailed to
parties of record

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

AROLOD COLIN

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

/

No. C-99-5045 EDL

ORDER DENYING PLAINTIFF'S MOTION TO ALTER OR AMEND JUDGMENT, OR ALTERNATIVELY, FOR RELIEF FROM JUDGMENT

(Filed Sept. 7, 2001

INTRODUCTION

On May 17, 2001, this Court issued an Order granting Defendant's Motion for Summary Judgment. On May 18, 2001, judgment was entered. On June 4, 2001, Plaintiff filed this Motion to Alter or Amend Judgment, or Alternatively, for Relief from Judgment pursuant to Federal Rules of Civil Procedure 59(e) and 60(b). Defendant filed its Opposition on June 26, 2001. Plaintiff timely replied.

The court held a hearing on July 31, 2001. John DeMeo and James Barrett appeared on behalf of Plaintiff. Scott Nonaka and John Lyons appeared on behalf of Defendant. Upon consideration of the parties' arguments at the hearing and their submissions, and for the reasons set forth below, the court enters the following order.

LEGAL ANALYSIS

Applicable Legal Standard

Any party may seek reconsideration of a ruling on summary judgment motion. *See Taylor v. Knapp*, 871 F.2d 803, 805 (9th Cir. 1989). Reconsideration is only appropriate where: (1) the district court is presented with newly-discovered evidence; (2) the district court "committed clear error or that initial decision was manifestly unjust;" or (3) there is any intervening change in controlling law. *See School Dist. No. 1J Multnomah County v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). Motions for reconsideration should not be frequently made or freely granted. They are not a substitute for appeal or a means of attacking some perceived error of the court. *See Twentieth Century-Fox Film Corp. v. Dunahoou*, 637 F.2d 1338, 1341 (9th Cir. 1980). Specifically, a motion to alter or amend may not be used to raise arguments or to present evidence that could reasonably have been raised or presented before the entry of judgment. *See Blacklund v. Barnhart*, 778 F.2d 1386, 1388 (9th Cir. 1985) (oppositions which could have been presented at the original hearing are improper on a motion for reconsideration).

Where reconsideration is requested based on newly discovered evidence, as here, courts apply the test borrowed from cases considering motions under Rule 60(b)(2) for relief from judgment based upon newly discovered evidence. *See Jones v. Aero/Chem Corp.*, 921 F.2d 875, 878 (9th Cir. 1990) (citing 11 C. Wright & Miller, *Federal Practice and Procedure: Civil*, § 2859 (1973)). To constitute newly discovered evidence, the evidence must: (1) have been discovered after judgment and the movant must have been excusably ignorant of

the facts at the time of judgment despite due diligence to learn about the facts of the case; (2) must be of a nature that would probably change the outcome of the case; and (3) must not be merely cumulative or impeaching. *Id.*; *see also Coastal Transfer Co. v. Toyota Motor Sales, USA*, 833 F.2d 208, 211-12 (9th Cir. 1987) (evidence in movant's possession or that could have been discovered through reasonable diligence is not newly discovered evidence for Rule 59(e) motion); *Contempo Metal Furniture Co. v. East Texas Motor Freight Lines, Inc.*, 661 F.2d 761, 766 (9th Cir. 1981) (movant must show failure to discover evidence earlier despite due diligence).

In *Waltman v. International Paper Co.*, 875 F.2d 468, 473-74 (9th Cir. 1989), the plaintiff filed a motion for reconsideration pursuant to Rule 59(e) and submitted various documents with her motion, including excerpts from depositions, her own affidavit and several internal memoranda. The court found that the majority of the material attached to the plaintiff's motion for reconsideration was available to the plaintiff at the time she filed her motion in opposition to summary judgment. Because these materials were available to the plaintiff when she opposed the summary judgment motion and she did not provide any explanation as to why she did not include the materials with her opposition, the court held that the plaintiff's submission of these materials with her motion for reconsideration was untimely. *Id.*

Waltman reached this conclusion even though the plaintiff's motion for reconsideration included one deposition that was not completed until two days after she filed her motion opposing summary judgment. The court reasoned that the plaintiff could have presented

this evidence to the court before her motion for reconsideration. *Id.* For example, the plaintiff could have filed a motion for a continuance under Federal Rule of Civil Procedure 56(f) to allow her time to depose the remaining witnesses and prepare the evidence for the court. Alternatively, the plaintiff could have asked the court for permission to supplement her motion in opposition to summary judgment when the deposition became available. "Because [the plaintiff] failed to take the proper steps to insure consideration of this deposition, [the court] decline[d] to allow her to slip it into the record through the motion for reconsideration." *Id.* (citing *Pasternak v. Lear Petroleum Exploration, Inc.*, 790 F.2d 828 (10th cir. 1986)); *see also Trentacosta v. Frontier Pac. Aircraft Indus., Inc.*, 813 F.2d 1553, 1557 n.4 (9th Cir. 1987) (district court properly denied the plaintiff's motion for reconsideration by refusing to consider affidavits filed after the court heard the defendant's motion to dismiss where the plaintiff offered no excuse for not presenting them at time of hearing); *Frederick S. Wyle Prof'l Corp. v. Texaco, Inc.*, 764 F.2d 604, 609 (9th Cir. 1985) (district court's denial for reconsideration affirmed where the movant failed to show "not only that [the] evidence was newly discovered or unknown to it until after the hearing, but also that it could not with reasonable diligence have discovered and produced such evidence at the hearing").

Federal Rule of Civil Procedure 60(b) enumerates the grounds which a motion for relief from an order or judgment may be made. Among the grounds which permit reconsideration are: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been

discovered before the court's decision; . . . or (6) any other reason justifying relief from the operation of the judgment. Fed. R. Civ. P. 60(b).

Discussion

Here, Plaintiff argues that evidence submitted with his motion to alter or amend the judgment, as well as evidence submitted as part of his pre-trial documents four days before the entry of judgment, should have been considered by this Court. On April 3, 2001, Defendant took the depositions of Plaintiff's expert witnesses Bernard S. Noonan, a certified arborist, and Bruce E. Jarvis, a Public Land Surveyor. *See* Decl. of John F. DeMeo in Supp. of Pl.'s Mot. to Alter or Amend J. or, Alternatively, For Relief from J. ¶ 6 ("DeMeo Decl."). Plaintiff submitted portions of these deposition transcripts in conjunction with this motion. On May 14, 2001, Plaintiff filed his pre-trial documents, including a Request for Judicial Notice. Based on this additional evidence, Plaintiff requests the Court to reconsider its entry of judgment against Plaintiff. Specifically, Plaintiff argues that this additional evidence clarifies the following mistaken assumptions made by this Court: (1) that the tree from which Plaintiff fell died of natural causes, rather than deliberate poisoning as in *Caplan v. United States*, 877 F.2d 1314 (6th Cir. 1989); (2) that Plaintiff swam 150 yards from the swimming beach into a wildlife management area, rather than 252 feet; (3) that the purpose underlying the Defendant's written safety policy was to protect people below the trees, rather than people climbing in them; (4) that it was unlikely that Defendant's policy applied to the tree from which Plaintiff fell; and (5) that there was no evidence

before the Court that Lake Sonoma is a water course through which water flows.

Defendant responds that the evidence on which Plaintiff bases his motion does not constitute "newly discovered evidence" because Plaintiff either possessed or could have obtained it before the summary judgment hearing. With respect to the depositions of Noonan and Jarvis, while the depositions were conducted after the summary judgment hearing, these individuals are *Plaintiff's own witnesses*. Plaintiff could have timely filed their declarations in opposition to the summary judgment motion. Plaintiff disclosed his experts on December 29, 2000 and produced their reports on February 16, 2001. *See* Decl. of Scott T. Nonaka in Opp'n to Pl.'s Mot. to Alter or Amend J. ("Nonaka Decl.") Exs. A, B. Defendant declares, and Plaintiff does not dispute, that their reports contain the exact opinions that Plaintiff contends are newly discovered evidence. *See* Nonaka Decl. ¶¶ 4,5. Moreover, Noonan testified that he examined the Yorty Creek area on June 21, 1999 and the tree stump on January 31, 2001. *See* DeMeo Decl. Ex. B (B. Noonan Dep.) at 22:20-23-3; 32:2-7. Likewise, Jarvis testified that he had done his survey work on December 4, 2000. DeMeo Decl. Ex. D (B. Jarvis Dep.) at 66:2-67:1. Therefore, Plaintiff either had the information he now seeks to rely on or could have reasonably discovered this evidence prior to filing his opposition to summary judgment as well as prior to the hearing.

Similarly, the evidence submitted as part of Plaintiff's pre-trial documents upon which Plaintiff now seeks to rely is not newly discovered evidence. Defendant argues, and Plaintiff concedes, that some of the information in the Request for Judicial Notice was produced by

Defendant as part of its initial disclosures. *See* DeMeo Decl. ¶ 13 at 8:2-4. More importantly, Defendant argues that the information attached as part of Plaintiff's Motion for Judicial Notice is available to the public and therefore Plaintiff had access to this information long before he filed his papers in opposition to the United States' motion for summary judgment. For example, the publication entitled "History of Sonoma County" was published in 1937 and is generally available to the public. *See* Mot. for Judicial Notice Ex. A. Similarly, the publication entitled "Historic/Ethnographic Survey of the Lake Sonoma – Warm Springs Dam Project Area" was published in 1979 and is also available to the public. *Id.* Therefore, with reasonable diligence, Plaintiff could have discovered this evidence well before he filed his opposition to Defendant's motion for summary judgment.

Plaintiff argues that because he presented the bulk of the new evidence prior to the entry of judgment, the Court should have considered this new evidence. Plaintiff does not explain, however, why he did not present this evidence in his opposition to summary judgment or address it at the hearing. Plaintiff's failure to submit this evidence in his opposition does not turn late filed documents into "newly discovered evidence." *See School Dist. No. 1J, Multnomah County v. ACandS, Inc.*, 5 F.3d 1255, 1262-63 (9th Cir. 1993).

Furthermore, Plaintiff gave no indication to this Court that he had any additional materials that the Court should consider before ruling on the submitted motion for summary judgment. If additional factual evidence needed to support an opposition to summary judgment is unavailable at the time of the motion, the

nonmoving party must seek a continuance under Federal Rule of Civil Procedure 56(f) by submitting affidavits to show why the necessary facts are currently unavailable – otherwise, the court is free to enter summary judgment. *See Carpenter v. Universal Star Shipping, S.A.*, 924 F.2d 1539, 1547 (9th Cir. 1991), *cert. denied*, 113 S.Ct. 413 (1992).

Plaintiff also argues that because he submitted evidence after the summary judgment motion was taken under submission and shortly before summary judgment was granted as part of his filings for the pre-trial conference as required by this Court's Pre-Trial Order, the court should have sua sponte considered this evidence in connection with the motion for summary judgment. Without any indication or request from Plaintiff that he wished the Court to consider his filings for the pre-trial conference in connection with the submitted motion for summary judgment, however, the Court had no reason to do so. Furthermore, although the depositions of Plaintiff's expert witnesses were not taken until after the summary judgment hearing, Plaintiff could have requested-leave to submit the testimony as evidence in connection with the motion for summary judgment. He did not. Instead, Plaintiff waited two months after summary judgment had been entered to submit the depositions. His request is unsupported by case law and is without merit.

Because the Court concludes that almost all the evidence submitted in conjunction with this motion and as part of his pre-trial documents is not "newly discovered" evidence, Plaintiff's motion to alter or amend the judgment is denied. Alternatively, even if the evidence

were newly discovered, the evidence would not constitute grounds to alter or amend the judgment, as explained below.[1]

1. Cause of Tree's Death

Plaintiff argues that the dead trees at the water's edge at Lake Sonoma, including the tree involved in Plaintiff's incident, did not die a natural death as assumed by this Court. *See* May 17, 2001 Order at 14:9-19. Plaintiff states instead that Defendant's conduct in building the reservoir and intermittently flooding the roots of the trees within the gross pool line caused the tree to die. Plaintiff relies on the deposition testimony of Noonan and Jarvis as discussed above. Plaintiff also cites to the deposition testimony of Kasey Wade, a professor of natural resource management and parks and recreation technology at Santa Rosa Junior College, taken on December 19, 2000. *See* Decl. of DeMeo in Supp. of Pl.'s Opp'n to Def.'s Mot. for Summ. J. ("DeMeo SJ Decl.") Ex. T. Plaintiff argues that Wade's testimony was before this Court as part of his opposition to summary judgment. Plaintiff only submitted a different portion of Wade's deposition transcript, however, not the portion of Wade's deposition on which Plaintiff now relies.

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[1] On June 26, 2001, the United States filed Objections to and Request to Strike Evidence in the Declaration of John DeMeo. The declaration did include improper argument. *See* Civil L.R. 7-5(b). The Court need not rule on the motion, however, as the same arguments were also contained in Plaintiff's briefs. The Court simply considered the briefs and disregarded the improper argument in the declaration.

Plaintiff argues that this evidence undermines the Court's distinction of *Caplan v. United States*, 877 F.2d 1314, 1317 (6th Cir. 1989), from this case. Plaintiff relied on *Caplan* in his original opposition to summary judgment for the proposition that, unlike other types of hazards, the risk created by unstable dead trees is not as obvious to an invitee as to a landowner. Of course, as a case from another circuit, *Caplan* is not controlling here.

In *Caplan*, the plaintiff was injured when a thirty-foot long dead tree fell and struck him. *Id.* at 1315. All the trees in the area, including the tree that injured the plaintiff, had been deliberately injected with herbicide eight years earlier as part of the government's mass herbicide program to clear out low quality trees. *Id.* Plaintiff argues that the new evidence shows that, as in *Caplan*, the government played an active role in killing the trees at Lake Sonoma. Accordingly, the Plaintiff argues that Defendant's actions rise to the level of willful and malicious conduct.

Even if this Court were to consider Plaintiff's belated evidence, the circumstances in *Caplan* would still differ importantly from those here. In *Caplan*, the government specifically intended to kill a large number of trees as an end in itself, and deliberately destroyed a large swath of forest in a manner known to itself but invisible to any visitor. By contrast, here the government's purpose was to create a reservoir; the death of some trees was merely a side effect, not the specific result intended. The deliberate creation of a massive hidden hazard that supported a finding of wilfulness [sic] in *Caplan* does not exist here. Thus, the Court

remains unpersuaded that the reasoning of *Caplan* supports alteration or amendment of the judgment here.

2. Distance from Beach to Tree

Plaintiff contends that the Court incorrectly assumed that Plaintiff swam 150 yards from the swimming beach into a wildlife management area. *See* May 17, 2001 Order at 11:10-11. Plaintiff relies on the deposition testimony of Bruce E. Jarvis, which according to Plaintiff, establishes that the distance from the swimming beach to the subject tree was between 252 and 255 feet, not 150 yards. *See* DeMeo Decl. Ex. D. (B. Jarvis Dep.) at 70:20-22.[2]

The Court's use of 150 yards as the distance between the swim beach and the tree was based on an exhibit submitted by Plaintiff. *See* DeMeo SJ Decl. Ex. X. Moreover, this distance is not necessarily inconsistent with Jarvis' opinion. Jarvis testified that he measured two distances: (1) from the point where the rip rap intersected the water to the tree stump; and (2) from the closest point on the swim beach to the tree stump. *See* DeMeo Decl. Ex. D (B. Jarvis Dep.) at 70:1-6. These measurements, according to Jarvis, were based on his own assumption about where someone would enter the water if he or she wanted to swim to the stump, not on

[2] As previously noted, Jarvis' testimony cannot be considered newly discovered evidence because it was either in Plaintiff's possession or reasonably discoverable prior to the summary judgment hearing.

the actual distance that Plaintiff swam or the distance from other points on the beach. *Id.* at 70:14-19.

In any event, the precise distance is immaterial to this Court's judgment. Whether Plaintiff swam 150 yards or between 252 and 255 feet is immaterial to whether the government acted willfully or maliciously. Either way, it is undisputed that Plaintiff swam outside the roped area, but in a part of the reservoir where swimming was permitted.

3. Purpose Underlying the Policy

Based on evidence presented to the Court, the court found that the "uncontradicted evidence shows that the purpose underlying the policy was to protect those below from being injured by falling tree limbs, rather than to protect those climbing the tree since they were not supposed to do so," relying on the deposition testimony of Park Manager Steven Leonard. May 17, 2001 Order at 11:17-19. Leonard testified that he considered a dead tree limb a dangerous condition because of the potential injury to those below the tree, and not because those climbing the tree may be injured as they were not supposed to do so. *Id.* Plaintiff now argues that the evidence before the Court indicated that the purpose of the tree policy was to protect persons in the trees as well as those under the trees. Plaintiff points out that Park Manager Perry Crowley testified in his deposition, which was timely submitted with the motion for summary judgment, that if he were aware that the tree was dead and that people were continually jumping from it, he would have the tree removed because "people are not to be jumping from, whether it's trees or rocks or cliffs,

off into water because it's hazardous." *See* DeMeo SJ Decl. Ex. F (P. Crowley Dep.) at 70:20-71:18.

While the Court acknowledges that this particular testimony by Crowley raises a triable issue of fact as to whether the policy was intended to protect both jumpers and swimmers, this issue is not material to the judgment. Although Park Manager Peter Crowley testified that if he were aware that people were jumping from a particular dead tree, he would have had it removed, he also testified that he was not aware that people were jumping from the tree from which Plaintiff fell. *See* Decl. of Scott T. Nonaka in Supp. of Def.'s Mot. for Summ. J. ("Nonaka SJ Decl.") Ex. L (P. Crowley Dep.) at 70:23-71:18. Thus, Crowley's testimony about the policy was that removal of trees for the purpose of protecting jumpers was limited to removal of those particular dead trees that he knew people were jumping from, and this did not include the one that led to Plaintiff's injury. Similarly, Park Manager Steven Leonard testified that although he knew there were some dead trees in the area of the accident, he does not recall any reports that people were climbing those trees. *See* Nonaka SJ Decl. Ex. Q (S. Leonard Dep.) at 35:2-25.

More fundamentally, Plaintiff had to raise a triable issue of fact as to willfulness. The Court took into account numerous other factors in reaching its conclusion that Plaintiff failed to raise a triable issue of fact as to willfulness. The Court found that Plaintiff did not raise a triable issue of fact as to the other prongs of the test for willfulness: actual or constructive knowledge that injury was a probable, as opposed to possible, result of the hazard of dead trees and conscious failure to avoid the peril. Among other things, the Court relied on the conceded lack of any

similar prior accidents at Yorty Creek *see* May 17, 2001 Order at 7, and the Defendant's patrols of the area for compliance with the "no jumping" rule. *See id.* at 14. Accordingly, the court still would reach the same conclusion on willfulness.

4. Tree Removal Policy's Application to Tree

Plaintiff argues that the Court improperly relied on the Reply Declaration of Perry Crowley concerning the wildlife habitat policy in concluding that the government's tree removal policy did not apply at Yorty Creek outside of the designated swim area. At the April 3, 2001 hearing on the motion for summary judgment, the Court noted that the submission of Perry Crowley's Reply Declaration concerning the wildlife habitat policy at Lake Sonoma may have been improper. Plaintiff therefore argues that the Court's reliance on the Crowley Declaration constituted "surprise" pursuant to Federal Rule of Civil Procedure 60(b). Plaintiff contends that had he known that the Court was going to rely on the Crowley Declaration, he would have objected that the declaration should be disregarded as directly contradicting Crowley's earlier deposition testimony that public safety concerns trump the protection of wildlife habitat at Lake Sonoma. *See* DeMeo SJ Decl. Ex. F (P. Crowley Dep.) at 69:12-18. The Court accepts Plaintiff's explanation and assumes that he would have done so if not for the Court's comments.

Crowley's deposition testimony is not, however, inconsistent with Crowley's Declaration. Crowley's testimony that "*normally*, the safety of the user at Lake Sonoma comes first," does not directly contradict his

declaration about the policy of preserving dead trees in the wildlife habitat area. *See* DeMeo SJ Decl. Ex. F (P. Crowley Dep.) at 69:17-18 (emphasis added). As set forth above, he also testified that a dead tree would only be removed when Defendant knew people were endangered by using that particular dead tree. *See* DeMeo SJ Decl. Ex. F (P. Crowley Dep.) at 71:5-11. Thus, according to his testimony, the government reconciled the goals of public safety and wildlife habitat by only removing particular trees known to be used dangerously by visitors.

More importantly, even if the Court excluded Crowley's reply declaration, the Court would reach the same conclusion because Defendant properly presented evidence to the same effect regarding the wildlife management area in its original moving papers. For example, Crowley testified in his deposition that the Yorty Creek area is "all within an 8,000 acre wildlife management area, and dead trees serve as wildlife habitat as well as live trees. So unless a particular tree is determined to be a safety hazard for some reason, we have no reason to remove it." *See* Nonaka SJ Decl. Ex. L (P. Crowley Dep.) at 63:1-11. Similar evidence was also contained in a government memorandum by Park Ranger Tim Golden, which Plaintiff submitted as part of his opposition to the Defendant's motion. *See* DeMeo SJ Decl. Ex. X ("Lake Sonoma is designated for fish enhancement so most of the vegetation was not cleared."). Furthermore, the map submitted at that time by Plaintiff indicates that "trees have been left in the upper stretches of Warm Springs Creek and Dry Creek in order to provide an underwater habitat for various species of fish." *See id.* Ex. FFF. Therefore, even if this Court were to delete the reference made to Crowley's Declaration in its May 17, 2001 Order and cite instead to

the evidence submitted with the original moving papers, such as Crowley's deposition testimony and Tim Golden's memorandum, this Court would reach the same conclusion.

At the hearing, Plaintiff sought to introduce evidence in the form of maps that Yorty Creek is not contained within the designated wildlife habitat area. Plaintiff referred to exhibits attached to the declaration of Holly Hoods, a Research Curator of the Healdsburg Museum and Historical Society, submitted in conjunction with this motion. One map depicts Lake Sonoma in 1967 and another map depicts Lake Sonoma in 1973. *See* Decl. of Holly Hoods in Supp. of Mot. to Alter or Amend J. or, Alternatively, for Relief from J. Exs. B, C ("Hoods Decl.").

First, this evidence is not newly discovered evidence and does not support a motion to alter or amend the judgment. Second, even if this Court were to consider these maps, they are ambiguous at best and in any case are not relevant because they depict the area prior to the relevant time period. If the Court were to consider Plaintiff's belated submission of the maps, the Court would also consider Defendant's evidence presented in response, demonstrating that the maps Plaintiff would now have the Court rely on depict the Yorty Creek area at a time when the wildlife management area was less than half as large as it was when the accident occurred. Specifically, Defendant's maps show that although Lake Sonoma originally consisted of a wildlife management area of only approximately 3,200 acres in 1979, the wildlife management area increased to approximately 8,000 acres, as shown on a later map dated April 1988. *See* Def.'s Exhibit List Exs. A, F.

Finally, even if this Court were to eliminate its discussion of the wildlife management area from its May 17, 2001 Order, the Court would still find that Plaintiff did not raise a triable issue of fact as to whether the government's actions rise to the level of willful or malicious conduct required by the California Recreational Use Statute and Ninth Circuit precedent. The Court's reference to the wildlife management area was but one factor among many that supported its decision and its elimination would not alter the result.

5. California Resort Act's Application to Lake Sonoma

Plaintiff argues that the Court mistakenly concluded that the Yorty Creek Swim area is not a "resort" within the meaning of the California Resort Act, California Health and Safety Code sections 116000, *et seq.* According to Plaintiff, evidence included in his Motion for Judicial Notice, filed as part of his pre-trial papers after the motion for summary judgment was submitted, shows that an earthen dam was constructed to artificially create the Lake Sonoma Reservoir; that the reservoir contains water from a number of pre-existing streams, the two largest of which are Dry Creek and Warm Springs Creek; and that water in the reservoir from these streams is continually released by the dam to the same water channel as prior to the construction of the dam and eventually flows into the Russian River and the Pacific Ocean.[3]

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[3] Plaintiff also argues that his Motion for Judicial Notice includes material that confirms that there was a marina at Lake Sonoma on or

(Continued on following page)

As previously discussed, the evidence submitted as part of Plaintiff's pre-trial documents cannot be considered newly discovered evidence. Even if this Court were to consider this evidence, it would not be sufficient to create a triable issue of fact as to whether Lake Sonoma is a river or stream within the meaning of the statute. First, as a general proposition, the mere fact that some rivers or streams feed into a lake and some water flows out of an outlet, whether by nature or artifice, does not convert a body of largely standing water into a river. Indeed, a lake may constitute simply "a widened portion of a river." *See* Black's Law Dictionary (Sixth Edition).

Furthermore, the Court observed in its May 17, 2001 Order, that it is "questionable whether Plaintiff's injury resulted from an occurrence of the nature of which the California Resort Act was designed to prevent." May 17, 2001 Order at 20:9-11 (citing *Chidester v. United States*, 646 F. Supp. 189, 192 (C.D. Cal. 1986)); *see also Judd v. United States*, 650 F. Supp. 1503, 1510 (S.D. Cal. 1987). The court now concludes that the injury was not of the type the Act was aimed at preventing. The Act was intended to help prevent deaths from eddies, currents and pools in rushing rivers, not relatively still reservoirs. This

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before the date of Plaintiff's incident and documents some of the monetary charges made by Defendant's concessionaire at Lake Sonoma for the various uses of the Lake Sonoma Resort Marina Area, including access to the reservoir. *See* Mot. for Judicial Notice Ex. B. Again, this evidence is not newly discovered evidence. Indeed, Plaintiff's counsel avers that information about the marina and the concessionaire was produced by the Untied States as part of its initial disclosures. *See* DeMeo Decl. ¶ 13 at 8:2-4. In any event, as the Court previously found, it is uncontradicted that neither Plaintiff nor his companions made any purchases from the concessionaire. *See* May 17, 2001 Order at 17:1-2.

conclusion is reinforced by comparing the Resort Act, which applies to resorts on rivers or streams, with the separate safety statute that applies to lakes. *See* Cal. Health & Safety Code § 24000, Art. I. Unlike the Resort Act, which provides for warnings of hidden dangers from currents and submerged holes in the river bottom, the latter statute only regulates lifeboats because the hazard of drowning in lakes does not arise from eddies and currents. Accordingly, Plaintiff's new evidence is immaterial to the judgment.

CONCLUSION

Plaintiff's Motion to Alter or Amend Judgment, or Alternatively, for Relief from Judgment is DENIED. This Order disposes of Plaintiff's Motion to Alter or Amend Judgment (Dockets #52, 55, 56) and Defendant's Objections to and Request to Strike Evidence in the Declaration of John DeMeo (Docket #59).

Dated: September 7, 2001

/s/ Elizabeth D. Laporte
ELIZABETH D. LAPORTE
United States
Magistrate Judge

copies mailed to
counsel of record

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AROLDO COLIN, Plaintiff-Appellant, v. UNITED STATES OF AMERICA, Defendant-Appellee.	No. 01-17107 D.C. No. CV-99-05045-EDL Northern District of California, San Francisco ORDER (Filed May 07, 2003)

Before: SCHROEDER, Chief Judge, GOODWIN, and CLIFTON, Circuit Judges.

The panel has voted unanimously to deny appellant's petition for rehearing and to deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing and petition for rehearing en banc are DENIED.

CALIFORNIA CIVIL CODE

§ 846. Duty of care or warning to persons entering property for recreation; Effect of permission to enter

An owner of any estate or any other interest in real property, whether possessory or nonpossessory, owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose or to give any warning of hazardous conditions, uses of, structures, or activities on such premises to persons entering for such purpose, except as provided in this section.

A "recreational purpose," as used in this section, includes such activities as fishing, hunting, camping, water sports, hiking, spelunking, sport parachuting, riding, including animal riding, snowmobiling, and all other types of vehicular riding, rock collecting, sightseeing, picnicking, nature study, nature contacting, recreational gardening, gleaning, hang gliding, winter sports, and viewing or enjoying historical, archaeological, scenic, natural, or scientific sites.

An owner of any estate or any other interest in real property, whether possessory or nonpossessory, who gives permission to another for entry or use for the above purpose upon the premises does not thereby (a) extend any assurance that the premises are safe for such purpose, or (b) constitute the person to whom permission has been granted the legal status of an invitee or licensee to whom a duty of care is owed, or (c) assume responsibility for or incur liability for any injury to person or property caused by any act of such person to whom permission has been granted except as provided in this section.

This section does not limit the liability which otherwise exists (a) for willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity; or (b) for injury suffered in any case where permission to enter for the above purpose was granted for a consideration other than the consideration, if any, paid to said landowner by the state, or where consideration has been received from others for the same purpose; or (c) to any persons who are expressly invited rather than merely permitted to come upon the premises by the landowner.

Nothing in this section creates a duty of care or ground of liability for injury to person or property.

CALIFORNIA HEALTH & SAFETY CODE

§ 116000. "Resort" at river or stream

"Resort," as used in this article, means any public bathing or swimming place or resort on a river or stream.

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§ 116005. Ascertaining water depth and hazards

No person shall maintain a resort unless he or she carefully sounds the depth of water and locates the eddies and pools and determines the presence and nature of dangerous currents, sunken logs, rocks, and obstructions in the stream or river.

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§ 116010. Warning signs

No person shall maintain a resort unless signs indicating in plain letters the depth of water, the location of pools or eddies, and the presence and direction of currents of water are placed and maintained in the water during the season when bathing and swimming are permitted or invited.

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§ 116015. Safety ropes

No person shall maintain a resort unless safety ropes are stretched wherever necessary to show the line of eddies, pools, sunken obstructions, and other hidden dangers to bathers in the water.

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§ 116020. Misdemeanor

Every person who violates any provision of this article is guilty of a misdemeanor.